Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NANCY LANTHORN ELLIS, et al.,
Petitioners,

v.

WASHINGTON COUNTY, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

I. Whether jailers are deliberately indifferent when they know of a detainee's disorientation, despondency, history of psychiatric care, recent involuntary commitment for suicide, and multiple requests for medical care, but refuse to provide either medical care or protection from self-injury.

II. Whether a city and county are deliberately indifferent when they fail to provide needed, readily-available training to address a known, pervasive risk of serious injury to the least culpable inmates — pretrial detainees with little or no criminal history.

III. Whether a 380 pound corrections officer may have used excessive force against a pretrial detainee who was lying on the floor of his cell when an autopsy revealed bruising on the buttocks consistent with a shoe print or stomp.

List of Parties to the Proceeding

The plaintiffs/petitioners are Nancy L. Ellis (mother of the deceased, Craig W. Lanthorn) individually and as next friend for Catherine E. Lanthorn (afterborn minor child of the deceased). There are no parent companies nor corporate entities involved in the proceeding.

The defendants/respondents in this case are Washington County, Tennessee; Johnson City, Tennessee; Ron Street, Chief of Police, in his Official Capacity; Sam Garland (Johnson City jailer), in his Individual and Official Capacity; R. D. Jamerson and Billy Mitchell (Washington County jailers), in their Individual and Official Capacities; and Fred Phillips, Successor to Ron England as Sheriff of Washington County, Tennessee, in his Official Capacity.

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OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 198 F.3d 225 (6th Cir. 1999) and is in the Appendix ("App") at page 1a. The Memorandum and Order of the District Court, from which plaintiffs appealed, is unreported and is in the Appendix at page 18a.

STATEMENT OF THE BASIS FOR JURISDICTION

Federal subject matter jurisdiction in this 42 U.S.C. § 1983 action is predicated upon 28 U.S.C. § 1331. Appellate jurisdiction arose under Fed. R. Civ. P. 54(b) and the trial court's certification thereunder. The trial court's Order was entered on August 4, 1998, and timely Notice of Plaintiffs' Appeal was filed on August 27, 1998.

A divided panel of the Sixth Circuit Court of Appeals affirmed the grant of Summary Judgment to defendants on November 30, 1999. App. at 1a. Plaintiffs submit this Petition for Certiorari to this Court pursuant to Rule 10 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this action is 42 U.S.C. § 1983 (App. at 82a) and the Fifth, Eighth, and Fourteenth Amendments to the Constitution are implicated in this matter.

STATEMENT OF THE CASE

From the time of his arrest on August 2, 1994 on misdemeanor charges, twenty-three (23) year old Craig Lanthorn's disturbing behavior and condition signaled his instability and risk of serious bodily harm. Sixth Circuit Opinion, App. at 3a-4a, 12a-13a.

The arresting officer, Hensley, observed at the time of the arrest that Lanthorn was disoriented, dazed, and foaming at the mouth. App. at 4a, 13a. A psychiatrist present at the arrest (Lanthorn's girlfriend's father) observed that Lanthorn was delirious or delusional and mistakenly referred to him as "Dr Fenley." App. at 3a-4a, 13a. The psychiatrist informed the arresting officer that Lanthorn "obviously needs" medical care. App. at 13a. Despite Lanthorn's condition, the officer took him directly to the Johnson City jail and charged him with public intoxication and trespass. App. at 4a.

Lara Bolton, the "booking" officer at the jail, observed that Lanthorn was "disoriented" and "not fully alert". *Id.* She noted on the booking card that Lanthorn was under treatment for anxiety and seizures, taking the prescription medication Klonopin, and was under the care of a physician. *Id.* He appeared to be highly intoxicated, slurred his speech, had a sloppy gait, was "kinda dirty," was "all over the counter," and was wearing a toboggan and long-sleeved shirt in August. District Court Memorandum and Order, App. at 44a. Despite these danger signs, Bolton made no attempt to contact Lanthorn's physician or check on his medication. *Id.*

Sometime later, Bolton heard a noise coming from Lanthorn's cell and asked defendant Officer Garland to check on Lanthorn. *Id.* Garland found Lanthorn lying on his back

in the cell, kicking uncontrollably, flopping about in a wild manner, forming at the mouth, screaming that he was having a seizure and pleading to be transported to the hospital. App. at 45a. Lanthorn's pleas were ignored. App. at 13a.

Garland left Lanthorn alone in his cell, instructed Bolton to call the Rescue Squad, and returned to his office. *Id.* A few minutes later when he heard noise coming from Lanthorn's cell again, Garland, who by his own admission weighed 380 lbs., went into Lanthorn's cell and physically restrained Lanthorn with his foot. App. at 16a, 45a. Although Garland claims he only lightly placed his foot on Lanthorn, Dr. Blake testified that his autopsy revealed bruising in the buttocks area "consistent" with a shoe print or stomp. App. at 16a, 69a.

When the Rescue Squad arrived, the technician found Lanthorn in a fetal position, alert, but very anxious. App. at 45a. Lanthorn told them he had been kicked by an officer and explained his history of anxiety attacks. App. at 46a. The medical technician instructed Garland to keep an eye on Lanthorn and both orally and in writing instructed Garland to contact Lanthorn's physician for further instructions about medication. App. at 13a, 46a. Garland did neither. *Id.* Instead, Garland signed a Rescue Squad form on a line reserved for the patient refusing to transport to the hospital and releasing all of Lanthorn's claims against the Rescue Squad. App. at 46a

The following day, Lanthorn was transferred to the Washington County jail. App. at 13a. Prior to the move, Garland witnessed other transportees teasing Lanthorn about "going to the big house." App. at 46a.

Arresting officer Hensley again transported Lanthorn and, because of a suicide conversation between Lanthorn and other prisoners, asked Lanthorn if he was contemplating suicide. App. at p. 14a. Hensley made the inquiry based in part upon Lanthorn's "high level of anxiety and upsetness." *Id.* Because Lanthorn allegedly denied suicidal intent, Hensley chose not to mention to Washington County the suicide talk, the bizarre behavior, the summoning of the rescue team, or Lanthorn's request for medical treatment. *Id.*

When Lanthorn arrived at the Washington County Jail, desk officer Castle had to "call him down" because he was "jumping up and down" and was "very upset." App. at 47a. Hensley asked Castle if anyone had called about Lanthorn. *Id.* Castle replied in the negative and asked "if there was a potential problem." *Id.* Hensley claimed that he did not "really know" what the problem was, but indicated someone from Johnson City would call. *Id.* Castle never received a call from Johnson City. *Id. at n. 2*

Lanthorn was then taken upstairs to booking officer, Wanda Robertson. App. at 47a. Robertson observed that Lanthorn disoriented, was agitated, appeared to still be under the influence of alcohol or drugs (now twenty-four hours after arrest), and was unsteady on his feet. App. at 48a. She also noted that he was "unkempt, hair not combed, maybe not shaved, clothes rumpled." App. at 48a. Lanthorn told Robertson he was on medication for panic attacks, seizures, and nerves, and that he was under the care of Dr. Patel and Dr. Finley. *Id.* Even though Robertson overheard Lanthorn promise his mother that, upon his release, he would check into a psychiatric hospital, Robertson did not become overly concerned. App. at 14a. Nonetheless, after the booking interview, Robertson assigned Lanthorn to cell T-3, the **suicide watch** cell. App. at 48a.

While the booking interview was being conducted upstairs, Defendant Billy Mitchell came in downstairs. *Id.* Approximately three weeks earlier, Mitchell had transported Lanthorn from the emergency room in leg irons to a psychiatric hospital for an involuntary commitment. *Id.* During the transport, Lanthorn told Mitchell that he had been raped, his girlfriend was pregnant, and he had thoughts of hurting himself. *Id.* The doctors at Lakeshore evaluated Lanthorn and decided to keep him, so Mitchell took his leg irons and left. App. at 48a-49a.

When Mitchell heard Lanthorn's name mentioned, he told Jamerson (his supervisor) that he had transported Lanthorn to a psychiatric hospital approximately a month earlier and that they "kept" Lanthorn. App. at 49a. Castle then advised Mitchell and Jamerson that the Johnson City jail had had "problems" with Lanthorn. *Id.*

Mitchell went upstairs to speak with Lanthorn, but found him on the phone upset, and he appeared to have been crying. *Id.* Several minutes later, after Lanthorn was placed in a holding cell, Mitchell returned to speak with him. App. at 50a. According to Mitchell, he asked Lanthorn if he was suicidal, and Lanthorn denied it – he said he wanted to be put in a smoker's cell. App. at 50a.

At that point, despite having seen Lanthorn distraught, without reviewing the booking card or discussing Lanthorn's condition with Robertson, without consulting the on-duty, on-site nurse, Mitchell told Officer John Cline that Lanthorn could go into a general population cell B-4, which was equipped with a camera but not regularly monitored. App. at 15a, 50a, 60a. In contrast, the suicide watch cell, T-3, to which Robertson had assigned Lanthorn, was monitored at all times by a trustee. App. at 50a.

Approximately 1-1/2 hours later at about 1:45 p.m., Jamerson saw Lanthorn putting his head in a noose (App. at 62a, 65a) but no one was alerted until at least 1:55 p.m. App. at 65a. The autopsy established that Lanthorn must have been hanging for approximately ten (10) minutes, because he was brain dead and had no heartbeat when help arrived. Depo. of Dr. Blake, App.at 82a-83a and depo. of Sue Forte, App. at 84a-85a. Although he was resuscitated, he died early the next morning. App. at 70a, 84a-85a.

Despite the foregoing facts, the trial court concluded that no rational jury could find that Garland, Jamerson, or Mitchell was aware of a significant risk of serious injury to Lanthorn, that no rational jury could find that there was an obvious risk, and/or that no rational jury could find Garland, Jamerson (except as to one (1) issue), or Mitchell acted unreasonably. App. at 60a-61a, 65a, 68a.

Moreover, neither Washington County nor Johnson City properly trained its officers to identify warning signals of prisoners' medical needs and/or needs for special handling, despite the fact that training was readily available through the Tennessee Corrections Institute. App. at 15a, 75a; depo. of Mike Jenkins (TCI trainer), App. at 87a-90a. Both jails knew that such training was important, as both had experienced numerous suicide attempts and multiple deaths. App. at 77a; depo. of Ron Street and errata sheet, App. at 91a-93a. In fact, Johnson City understood the importance of training enough to falsify its officers' training records to make it appear that they had received the pertinent courses. App. at 15a. Those few officers who claimed to have been trained on the handling of mentally and emotionally disturbed individuals prior to Lanthorn's death, received such poor training that they recalled little about it. App. at 75a.

Despite the falsification of training records and failure to train, the courts below summarily dismissed the claims against the municipalities. App. at 3a, 42a.

LEGAL ARGUMENT

I. Suicide by our Least Culpable Pretrial Detainees is a Pervasive Problem in Jails that this Court has not yet addressed

Suicide is the leading cause of death in jails. *See, e.g.*, *Hayes, National Study of Jail Suicides: Seven Years Later*; 60 Psychiatric Q. 1: 7 (1989) ("Hayes I"); Bonner & Rich, *Psychosocial Vulnerability, Life Stress and Suicide Ideation in a Jail Population: A Cross Validation Study*, 20(3) Suicide and Life Threatening Behavior 213 (1990) ("Bonner & Rich"); O'Leary, *Custodial Suicide: Evolving Liability Considerations*, 60 Psychiatric Q. No. 1:31 ("O'Leary"). Since at least 1978, the corrections community has known that the suicide rate in jails is an astounding 3.5 to 14 times higher than the rate in the general population. *See, e.g.*, Hayes I, *supra* at 13; Novick & Remlinger, *Study of 128 Deaths in the New York City Correctional Facilities* (1971-1976); *Implications for Prisoner_Healthcare*, 16 Med. J. 749-56 (1978); Salive, *Suicide Mortality in the Maryland State Prison System*, 1979-1987, 262 J. Am. Med. Ass'n., 3: 365 (1989).

For over a decade before the death involved in this litigation, concern over widespread and increasing frequency of suicide in jails was generally acknowledged in the corrections community. *See, e.g.*, Hayes, *And Darkness Closes In . . . A National Study of Jail Suicides*, 10 Crim. Just. and Behav. 462 (1983) ("Hayes II"). As early as 1981,

the American Medical Association was urging healthcare reform to address the problem of suicide in custody. *See, e.g.*, Gunby, *Healthcare Reform Still Needed in the Nation's Prisons*, 245 J. Am. Med. Ass'n. 211-14 (1981).

This pervasive problem most frequently affects the least culpable inmates--pretrial detainees with little or no criminal history because those "unsophisticated" inmates are most vulnerable to suffering "jail shock." Hayes I, *supra* at 13. For those with little or no criminal history, entry into the jail system predictably is viewed as frightening, traumatizing, disgracing, and humiliating. *See, e.g.*, Sherman & Morschauser, *Screening for Suicidal Risk in Inmates*, 60 Psychiatric Q. 2:119 (1989) ("Sherman and Morschauser"). The "unsophisticated" detainee is likely to feel shame and isolation which heighten vulnerability to suicide ideation. *See, e.g.*, Bonner & Rich, *supra* at 213; O'Leary, *supra* at 31. These feelings often trigger a temporary crisis known as "jail shock." *Id.* at 31-32.

The relationship between suicide and "jail shock" was well established some 5 years prior to the death involved in this case. Hayes I, *supra* at 8. Not surprisinglly, the risk of suicide is greatest in the first day to two days of incarceration. *Id.* While approximately fifty percent (50%) of the people held in jail are pretrial detainees, ninety-one percent (91%) of all suicides in jail were by detainees. *Id.* Clearly, pretrial detainees pose a substantially higher risk of suicide than other inmates.

Identifying the class of inmates at risk is relatively easy because the key characteristics have remained "virtually unchanged" over time. Hayes I, *supra* at 7. In addition, the relationship between drug or alcohol intoxication at the time of the arrest and suicide has been well established for

approximately a decade. For example, while only thirty-one (31%) percent of jail inmates or detainees are intoxicated at arrest, over sixty (60%) percent of jail suicide victims were intoxicated at arrest. *See, e.g.*, Hayes I, *supra* at 12; O'Leary, *supra* at 44. Furthermore, the increased suicide risk of detainees with histories of psychiatric illness was generally known for some time prior to this death. *See, e.g.*, Sherman & Morchauser, *supra* at 121-22; Bonner, *Isolation, Seclusion and Psychosocial Vulnerability as Risk Factors for Suicide Behind Bars,* at 402-03 "Bonner"; O'Leary, *supra* at 45.

The well-known "typical" profile of the suicide risk is a 22 year old, white, single male with little or no criminal history, arrested for intoxication, and having problems with his girlfriend or wife. Suicide most frequently will occur within the first forty-eight (48) hours of confinement, by hanging. Hayes I, *supra* at 8, 11; O'Leary, *supra* at 48; Salive, Crim. Just. Newsl., June 1, 1988 at 365; Sherman and Morschauser, *supra* at 119, Bonner, *supra* at 398.

Because jail shock is ordinarily a temporary crisis, simple observation could alleviate tragic results. The cost of addressing these concerns need not be great. In this case, there was a full-time nurse on duty, a local crisis team could have been called, and a suicide watch cell under 24 hour observation by a trustee was available. At absolutely no cost to Washington County, Craig Lanthorn's life could have been saved.

Traditionally, this Court has taken the lead in insuring that the Constitution is not left at the doors of our prisons, noting that the courts have learned from "bitter experience that judicial intervention is indispensable if constitutional dictates – not to mention considerations of basic humanity are

to be observed in the prisons." Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (concurrence by Brennan, Blackman and Stevens). As this Court has pointedly recognized, "prisons are not beyond the reach of the Constitution", and "no iron curtain separates one from the other." Hudson v. Palmer, 468 U.S. 517, 523 (1984), *citing* Wolff v. McDonell, 418 U.S. 539, 555 (1974). This Court's leadership has been "testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society" (*Id.*) and that our ethical tradition "accords respect and dignity and intrinsic worth [to] every individual." (*Id.* at 557-58, partial dissenting opinion). If this Court does not set the standard for the protection of our least culpable inmates from the ultimate deprivation – that of life itself -- this pervasive, predictable tragedy will only continue.

II. Absent Explicit Guidance from this Court, the Lower Courts have Adopted a Variety of Widely Inconsistent Approaches to the Problem

Although general guidance on constitutional duty was provided by this Court in both Estelle v. Gamble, 409 U.S. 97 (1976), and Farmer v. Brennan, 511 U.S. 825 (1994), the lower courts have distorted the principles of both when they have addressed suicide cases. The Eighth (or Fifth) Amendment standard for the obligation to provide medical care has never been interpreted by this Court to require that the jailer first be able to diagnose a specific medical outcome or condition as a prerequisite to that jailer's duty to obtain adequate medical assistance or take precautions, nor has the jailer been free to ignore risk unless the jailer recognized the

certainty or strong likelihood of a specific outcome. If the red flags of risk are present and known to the jailer or are so obvious that the jailer's knowledge would properly be presumed, the duty to provide care is triggered whether or not the jailer is competent to differentially diagnose between a heart attack and indigestion or an aneurysm and a headache. The lower courts, however, have generally distorted this Court's rulings when suicide has been the outcome.

A. The trend below is to apply an overly demanding and outcome-specific test

Where the result is suicide, the circuits have used a variety of approaches to exonerate jailers unless plaintiffs can show that the jailers were certain or nearly certain that suicide would be the specific outcome.

The resulting legal standard is overly demanding in that it requires proof of knowledge of a strong likelihood or near certainty rather than knowledge of a serious risk and it absolves jailers of liability unless they can be shown to possess diagnostic skills in an area that even eludes the professionals.

That over-demanding standard was applied in this case by the trial court relying upon Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989) to dismiss all but one claim against one jailer in question. The trial courts' requirement of proof of not only knowledge of a risk, but certainty of the specific outcome, in effect relieves all jailers, except for the clairvoyant, of responsibility for this pervasive risk.

The outcome specific standard has been applied in other circuits as well, although varying degrees of knowledge of risk appear to be required. See, *e.g.*, Bowen v. City of

Manchester, 966 F.2d 13, 17 (1st Cir. 1992) (exonerates the jailer unless the jailer is shown to have "actual knowledge" or willfull blindness to "unusual and large possibility" that suicide would be committed); Colburn v. Upper Darby Township, 946 F.2d 1017, 1024 (3d Cir. 1991) (requires a "strong likelihood" of suicide); Payne v. Churchich, 161 F.3d 1030, 1042 (7th Cir. 1998) (requires defendant to foresee the substantial risk of suicide-outcome specific); Lambert v. City Of Dumas, 187 F.3d 931, 934 (8th Cir. 1999) (requires a strong likelihood and outcome specific); Barrie v. Grand County, 119 F.3d 862, 869 (10th Cir. 1997) (applies the outcome specific test); Williams v. Lee Co., 78 F.3d 491, 493 (11th Cir. 1996) (requires a strong likelihood of suicide - outcome specific).

B. Farmer v. Brennan applied with an outcome specific focus will exonerate virtually all defendants except those who confess their knowledge of risk

The Fifth Circuit appears to mirror a disturbing approach in the lower courts -- that is, to apply Farmer in such a way as to hold that the actions and events that establish the necessary subjective knowledge of risk, at the same time exonerate the actor. *See, e.g.* Flores v. County of Hardeman, 124 F.3d 736 (5th Cir. 1997). *But see* Owens v. City of Philadelphia, 6 F. Supp. 2d 373 (E.D. Pa. 1998) (rejects the circular resoning). It is rare, indeed, that jailers will admit they were aware of a risk of suicide and ignored it. In the vast majority of cases, the knowledge of the risk must be demonstrated through some behavior or action on their part that circumstantially establishes knowledge of the risk.

In this case, the jailers in Washington County claimed to have done a "suicide assessment" i.e., they asked Lanthorn

whether he was suicidal. That single fact establishes at least some subjective knowledge of or expectation of risk. The trial court, however, used that fact to say that defendants were not indifferent to the risk because they did an assessment. *App.* at 60a, 61a. No inquiry was permitted into the reasonableness of the jailer's response to the known risk.

The temptation to interpret virtually any action directed toward the risk (the circumstantial proof of knowledge of the risk) to be proof that no deliberate indifference existed creates an analytical construct by which virtually all defendants will be exonerated and the pervasive problem of pretrial detainee suicides in jails will continue unabated.

Without the guidance of this Court, lower courts are exonerating jailers unless the jailers demonstrate a skill in evaluating suicide that even professionals cannot attain. The practical outcome of those approaches is to deny plaintiffs virtually any protection from the leading cause of death in jails.

III. This Case is a Vivid Illustration of the Fallacy of the Current Approach

The fallacy of the outcome specific or near-certainty test and/or the misapplication of Farmer is dramatically demonstrated in this case. This was not simply a suicide case. Hours before the suicide occurred, Lanthorn endured denials of medical care, and was assaulted by a jailer while on the floor of his cell having an apparent seizure. The autopsy showed that when Lanthorn entered the jail he was toxic and borderline lethal on his prescription medication for panic and anxiety attacks. App. at 67a. Seizures and delusions being

commonly associated with high levels of that prescription drug, his subsequent medical crisis and ultimate suicide are not surprising. Indeed, Lanthorn's suicide may well have been the direct result of his toxic state.

Had the jailers properly responded to his multiple requests for medical care, or to the direction from the EMT that Lanthorn's doctor be contacted, or if they had taken seriously his complaints of abuse, Lanthorn would not have become another jail suicide statistic. But because this case ultimately involved suicide, the only question that the Sixth Circuit majority entertained was whether the jailers foresaw the result, not whether they should have obtained medical care as requested and directed or whether the jailer should answer for the abuse, or even whether some need for psychiatric evaluation was obvious.

Ironically, the Sixth Circuit majority premised the bulk of its opinion exonerating defendants on the fact that the decedent's mother, Nancy Lanthorn Ellis, is a psychologist. App. at 5a. The Court reasoned that if she could not recognize suicidal behavior, the jailers could not be expected to do so. *Id.* Although the signs of mental and emotional instability are generally obvious even to lay persons (nervousness, anxiety, disorientation, depression, etc.) predicting the precise outcome of that instability continues to elude even professionals. As Justice Stevens explained in Barefoot v. Estelle, 463 U.S. 880, 920-21 (1983) (concurrance), addressing the use of expert testimony in the context of sentencing hearings, "mental health professionals . . . when predicting violence, dangerousness and suicide . . . are far more likely to be wrong than right." *Citing* Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527, 600 (1978).

The Sixth Circuit majority's focus on what the decedent's mother knew or failed to recognize about her son's behavior is misplaced. While he was a pretrial detainee, responsibility for his care was the jailers', not hers. The victim's mother did not see him in the jail and there is no evidence to suggest that she was advised of his seizures or other bizarre behavior. Depo. of Dr. Ellis, App. at 94a-96a. Craig Lanthorn was not her patient, he was her son. She did not have access to the jailers' training that would have alerted her to the special and increased risks associated with incarceration and would have alerted her to significantly heightened risk given her son's particular circumstances.

She did what many parents believe to be the responsible thing to do. She let her son spend some time in jail to reflect upon his irresponsible behavior. App. at 94a. Unquestionably, had she known the increased risk of suicide and these jailers' lackadaisical attitude toward same, she would not have let him stay. Depo. of Dr. Ellis, App. at 97a-98a.

The jailers, on the other hand, would have clearly recognized the need to protect Craig Lanthorn if they had simply received the training that was readily available from the Tennessee Corrections Institute and if they had followed that training.[1]

---

[1] The Tennessee Corrections Institute "TCI" makes training available to all Tennessee jailers. With respect to suicide issues, TCI teaches of the increased risks of suicide discussed at pp. 12-15 supra, and counsels jailers to look for red flags indicating the need to take precautionary steps to decrease the risk of death. App. at 87a-90a.

Jailers' obligation to those in their custody must be triggered by what they know, not excused by their inability to precisely predict the outcome or evaded on a blame-the-family theory. The extreme psychological reactions triggered by incarceration are well within the knowledge of the corrections community and it is the corrections community who is in the best position to take meaningful steps to reduce the mortality rate among our least culpable inmates.

The evidence in this case is overwhelming that the municipal entities, though aware of the pervasive risk of suicide, failed to make any reasonable effort to train their jailers to deal with such known risks. Washington County, for example, maintained a paper suicide policy in its jail manual that, if followed, would likely have saved Lanthorn's life. Washington County Jail Manual, App. at 99a-101a. Defendant Mitchell (who made the decision to remove Lanthorn from the suicide watch cell assignment), however, had never seen the manual until a year and a half later at his deposition. App. at 15a-16a. Johnson City was obviously aware of the importance of suicide training as it went to the trouble of falsifying its training records to create the appearance that such training had been given. App. at 15a.

One of the ironies of the application of the outcome specific tests in the context of Farmer's requirement of actual knowledge is that municipalities' employees now benefit from ignorance. So long as the outcome must be predicted with precision and little or no training is given to help jailers identify the known risk factors, the individual jailers will escape liability on the first prong of the Farmer test of deliberate difference. Often in such circumstances, the lower courts reason that the municipalities cannot be held liable because there is no underlying liability of the individuals (as the courts below did in this case). Everyone then escapes

responsibility for a known, pervasive, predictable risk to our least culpable inmates. If the constitutional guarantees are to have any value to this class of vulnerable inmates, this Court must provide guidance to the courts below.

CONCLUSION

Just as jail conditions improve only under intense pressure from the courts, it is only under direction from this Court in defining acceptable performance that the leading cause of the ultimate deprivation (life) in jails will likely be meaningfully addressed. For this reason, Petitioners respectfully request that this Court grant Certiorari to resolve the important questions involved herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 30, 1999]

Nos. 98-6178/6228

Nancy L. Ellis, individually and as next friend of Catherine E. Lanthorn) Catherine E. Lanthorn, minor child of deceased, Craig W. Lanthorn, *Plaintiff-Appellants/ Cross-Appellees,*	)
v.	)
Washington County and Johnson City, Tennessee; Ron Street, Chief of Police, in his Official Capacity; Sam Garland, in his Individual and Official Capacity, as a jailor employed by Johnson City; R. D. Jamerson and Billy Mitchell, Officers of the Jail, Washington County Sheriffs Department, in their Individual and Official Capacities; Fred Phillips, Successor to Ron England as Sheriff of Washington County, Tennessee, in his Official Capacity, *Defendants-Appellees,*	)

R. D. Jamerson)
Cross-Appellant.)
_____)

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.
No. 95-00325--Curtis L. Collier, District Judge.

Published Cite 198 F.3d 225 (6th Cir. 1999)

Before: MERRITT, KENNEDY, and DAUGHTREY, Circuit Judges.

MERRITT, J., delivered the opinion of the court, in which KENNEDY, J., joined. DAUGHTREY, J. (pp. 11-16), delivered a separate opinion concurring in part and dissenting in part.

OPINION

MERRITT, Circuit Judge. In this wrongful death action, plaintiffs, Nancy Ellis, individually, as the mother of Craig Lanthorn, now deceased and as next friend of Catherine E. Lanthorn, and Catherine Lanthorn, individually, minor child of deceased, Craig Lanthorn, sued the defendants, Johnson City and Washington County, Tennessee, a city and the county in which it is located. Plaintiffs also sued three jailors: Sam Garland, employed by the Johnson City Jail; and R. D. Jamerson and Billy Mitchell, employed by Washington County Jail. Plaintiffs brought suit under 42 U.S.C. § 1983 for the suicide of Craig Lanthorn while incarcerated at the Washington County Jail on August 3, 1994, three hours after being transferred there from the Johnson City Jail. The

primary issue we deal with in this opinion is whether the actions or policies of the defendants, or any of them, was the proximate cause of the suicide. We conclude as to all defendants, except Jamerson, that the plaintiffs have failed to establish proximate causation and therefore affirm the summary judgment entered below as to Washington County and Johnson City. We affirm the District Court's grant of summary judgment on grounds of qualified immunity to jailors Garland and Mitchell. We conclude that we lack interlocutory appellate jurisdiction as to the defendant Jamerson's claim that the District Court erred in refusing to grant him qualified immunity.

I. Washington County's Liability for Failure to Train Its Jailors to Prevent Suicide

The case proceeded in the court below on the theory that Craig Lanthorn committed suicide in "cell block B-4" the Washington County Jail by hanging himself at approximately 1:55 P.M. on August 3, 1994. This cell had a monitor camera at one end. It was not designed as a suicide prevention cell. Plaintiffs claim that Lanthorn should have been placed in a suicide prevention cell and that all sheets and clothing useful in committing suicide should have been removed. They also claim that the County did not give the jailors adequate training in suicide prevention.

On the afternoon of August 2, 1994, Craig Lanthorn was arrested at the residence of Dr. and Mrs. James Turnbull, following a 911 call from the Turnbull's daughter, Sara, reporting that Lanthorn, her boyfriend, was attempting to break into the house. She left the residence and hid in a neighbor's yard after Lanthorn broke a window to gain access

through the back door. Dr. Turnbull, a psychiatrist, testified that Lanthorn was "delirious or delusional," and he attributed this to "Lanthorn's drug use," not to suicidal tendencies or a mental illness. Arresting officer Hensley believed that Lanthorn was drunk. He was "dazed or disoriented," "unsteady on his feet" but "cooperative." Hensley carried Lanthorn to the Johnson City Jail and charged him with public intoxication and criminal trespass. He was held overnight in the Johnson City Jail. After he was arraigned in court the next morning, where he was represented by counsel, the Johnson City police carried him to the Washington County Jail to await trial.

During the period from 11:00 A.M. in the morning when Lanthorn arrived at the Washington County Jail until his suicide three hours later, nothing occurred that would put reasonable jailors on notice of a possible suicide attempt. Jailor Robertson talked to Lanthorn about suicide when Lanthorn arrived, and Lanthorn said that he was not a suicide risk and "loved life." A few minutes later Jailor Mitchell, who had gone to high school with Lanthorn, came on duty. He was concerned about Lanthorn's mental health and so advised his superior, who told him to determine if Lanthorn was a suicide possibility. Mitchell found Lanthorn on the second floor of the jail talking to his mother. He seemed to be crying. After the phone call, Mitchell engaged him in conversation. Mitchell asked Lanthorn, "Craig, are you suicidal?" Lanthorn said, "Hell no, I've got a baby on the way that I've got to take care of."

Finally, and most important of all, plaintiff in this case, Nancy Ellis, Lanthorn's mother, is an experienced, practicing, licensed, clinical psychologist with a Ph.D. She

stated two months after the death of her son in a letter that "he was not suicidal at 11:30 when I talked to him [on the phone]," and he "knew he was getting out [of jail]":

> Craig had everything to live for, a family who adored him, a child on the way, numerous friends and, a positive future. He was immensely likable. Although he had had some painful experiences, he was dealing with this in therapy and was very enthusiastic about treatment. One of the things we talked about in our last conversation was his next session with Ted (his psychologist). He was eager to get there. (App. 474.)

Based on these facts -- particularly in view of his mother's expert opinion two months later and jailor Mitchell's conversation about suicide -- there is no evidence from which a reasonable jailor would have foreseen suicide. No deliberately indifferent policy was a proximate cause of the death. When an experienced expert in the field of psychology, like decedent's mother, plaintiff, Nancy Ellis, was unable to predict suicide, and did not think it was necessary to warn her son's jailors of such a possibility, it is unreasonable to attribute fault to the County or its jailors for failing to predict suicide. The County was under no legal obligation to isolate Lanthorn in a suicide cell or take other extraordinary steps in anticipation of suicide. Whatever the county may have failed to do in training its jailors about suicide, its training program was not a proximate cause of the injury here. Its conduct was no more a proximate cause of the suicide than was the failure of plaintiff Ellis herself – an expert in the field -- to foresee the result.

The same reasoning applies to jailor Mitchell, the jailor who was in high school with Lanthorn. Mitchell recognized that Lanthorn was mentally unstable and interrogated him about suicide. After the interview, Mitchell made a mistake in assessing Lanthorn's suicidal tendencies -- just as did Lanthorn's mother -- but he certainly was not deliberately indifferent toward Lanthorn and exhibited a genuine concern for his welfare while in jail. The District Court did not err in granting summary judgment for Mitchell.

II. *Liability of Johnson City and its Jailors for Lanthorn's Suicide*

Although Lanthorn's suicide occurred in the Washington County Jail after his transfer, not in the Johnson City Jail, plaintiffs also seek to blame Johnson City and its jailors for the death of Lanthorn on grounds that Johnson City did not properly train its jailors in suicide prevention, which in turn led the jailors to fail to anticipate, and remain deliberately indifferent to, the possibility of Lanthorn's suicide. For reasons similar to those expressed above, we conclude that the actions and policies of Johnson City and its jailors did not proximately cause the suicide of Craig Lanthorn. There is no evidence to support a conclusion that the City or its employees should be held legally responsible for the suicide.

During the less-than-24-hour period Lanthorn was in the Johnson City Jail, he talked to his mother, plaintiff Nancy Ellis, four times by phone. He talked to his father, Dr. Lanthorn, also a clinical psychologist. His uncle, Tom Cowan, a local lawyer, came to see him in jail. Lanthorn also talked to his grandmother. Two family friends, the Farthings,

also came to see him in the jail. None of these relatives or family friends posted the $100 bond necessary to release him from jail because his mother and father both wanted him to stay in jail until he agreed to enter a drug treatment program. The record is clear on this point. Neither the mother -- the plaintiff in this case -- nor the father, nor any of the relatives or family friends, warned the jailors that Craig Lanthorn might be suicidal, nor did they provide the jailors with any information that would put them on notice that this young man might try to take his own life. Moreover, both of the two psychiatrists who had treated Lanthorn, Dr. Fenley and Dr. Patel, testified that Lanthorn's behavior in jail did not indicate suicide. From their testimony it is clear that they would not have predicted or anticipated suicide.

Under these circumstances -- with experts in the field, (including his mother and father and the two psychiatrists who had treated him) failing to recognize or anticipate suicide -- counsel's argument for the plaintiffs that the City and its jailors should be held blameworthy for similar mistakes under federal constitutional law is wholly without merit. The City and its jailors may or may not have been properly trained in suicide prevention -- we reserve judgment on that question -- but that did not proximately cause the injury here. In this case the evidence in the record before us would not support a finding that the defendants should be held legally responsible in damages because they failed to anticipate and prevent Lanthorn's suicide.

The questions discussed above are relatively easy, and reflection after a review of the record can lead to only one conclusion. Defendant Jamerson's cross-appeal from the

denial of his motion for summary judgment on qualified immunity presents a more difficult problem.

III. Jamerson's Cross-Appeal

In *Johnson v. Jones,* 515 U.S. 304, 319-20 (1995), Justice Breyer wrote for a unanimous court, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Here, the District Court determined that there was a genuine issue of fact for trial regarding Jamerson and denied his motion for summary judgment. We have held that in order for an interlocutory appeal based on qualified immunity to lie, "the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case." *Berryman v. Rieger,* 150 F.3d 561 (6th Cir. 1998).

The factual dispute here arises from plaintiffs' claim that Jamerson saw Lanthorn tie the noose around the bar at 1:45 P.M. but did not call an emergency medical team until 1:56 P.M. Plaintiffs further contend that Jamerson did not notify other jailers of the problem until 1:55 P.M. As evidence that Jamerson saw Lanthorn tie the noose at 1:45, plaintiffs rely on the following hearsay statements Sheriff Ron England made to the press on the day of Lanthorn's death:

> Our sergeant Jamerson was watching the monitors and seen [sic] him when he tried to place the loop on the bars and summonsed [sic] an upstairs jailer - they went in and one inmate

> helped hold him up and the jailers and the inmates took the noose from around his neck.

In a separate statement, Sheriff England said:

> [Lanthorn] was a Johnson City police department prisoner and . . . they transported him down here at 11:00 a.m. . . . [H]e was booked in, placed in a cell with four other inmates, and like I said at 1:45 while watching the monitor, sergeant Jamerson seen [sic] him put the sheet around his neck which was fashioned as a rope.

On appeal, Jamerson disputes these facts which might, if true, give rise to a finding of deliberate indifference. This sort of factual dispute is precisely what the Supreme Court has instructed appellate courts to avoid on an appeal of a denial of qualified immunity, except for one thing: The statement is unreliable hearsay. It is an out-of-court declaration, offered for the truth of the matter asserted, by a declarant, who subsequently testified by deposition that he has no personal knowledge about the event and does not know now why he made the statement or what it was based on.

The question then comes down to this: In a qualified immunity appeal by a state official, should the court of appeals look behind a *Johnson v. Jones* type factual dispute to determine if the factual dispute is based only on uncorroborated hearsay that will not be admissible at trial. We would prefer to avoid these kinds of evidentiary issues when ruling on our jurisdiction to decide qualified immunity under *Johnson v. Jones* because the issue of qualified

immunity cannot be "decided with reference only to undisputed facts," the requirement for appellate jurisdiction set out by the Supreme Court at 515 U.S. at 313. To decide on interlocutory appeal all of the possible fact related evidence questions present in the case would, as the Supreme Court observed, "consume inordinate amounts of appellate time" and "require a reading of a vast pretrial record" and even "greater delay" in bringing cases to a conclusion. 515 U.S. at 316.

The court below declined to grant Jamerson's motion for summary judgment because, and only because, of Sheriff England's hearsay statements. The summary judgment rule, Rule 56(e) is clear that such rulings may be based only on statements "made on personal knowledge" or statements otherwise "admissible in evidence" by a witness "competent to testify to the matters stated." Plaintiffs argue that the Sheriff's statement is an admission. But the Sheriff's admissions are not admissible in the case against Jamerson, which is against him personally.

Thus the only factual dispute in this case arises from the rankest type of inadmissible hearsay. Based on the Sheriff's deposition, the statement to the press was unreliable and inadmissible in evidence. No exception to the hearsay rule would let it in. Nonetheless, restrained as we are by *Johnson,* we must dismiss Jamerson's appeal because a factual dispute remains.

The judgment of the District Court is therefore affirmed as to all parties.

CONCURRING IN PART, DISSENTING IN PART

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring in part and dissenting in part. Despite the "relative[ ] eas[e]" with which the majority is able to dispense with plaintiffs' claims against defendants Washington County, Johnson City, Sam Garland, and Billy Mitchell, my review of the record in this matter reveals genuine issues of material fact that remain to be resolved concerning actions and inactions by those defendants. Consequently, while I concur in the majority's conclusion that we have no jurisdiction over defendant Jamerson's appeal at this time, I respectfully dissent from the remainder of the majority opinion.

Without question, the now-familiar 1986 trilogy of cases, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), "ushered in a 'new era' in the standards of review for a summary judgment motion" by lowering the movant's burden in such proceedings. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388 (6th Cir. 1993). Despite that relaxation, however, summary judgment remains improper unless *no* genuine issue of material fact exists in the case. Should such a dispute remain, faith in the jury system that undergirds American jurisprudence requires that the finders of fact be allowed to resolve the disagreement after hearing all relevant evidence.

In this case, the majority highlights selected facts from the record before us and, at one point in its analysis, concludes that "*[b]ased on these facts*. . . there is no evidence from which a reasonable jailor would have foreseen suicide."

(Emphasis added.) With that statement, I cannot disagree. With the benefit of additional evidence included in the record but not mentioned in the majority opinion, however, I believe a reasonable jury *could* find in favor of the plaintiffs on the excessive force, deliberate indifference, and failure-to-train claims. Viewing the facts in the record and the inferences to be drawn from them in the light most favorable to the plaintiffs, as we are required to do, *see, e.g., American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999), I believe reasonable jurors could conclude that the individual defendants had knowledge of Craig Lanthorn's need for medical treatment but were deliberately indifferent to that need. Moreover, evidence adduced by the plaintiffs was sufficient to enable a reasonable jury to question the adequacy of the defendant municipalities' training programs and to find that Officer Garland used excessive force in handling Lanthorn in the Johnson City jail.

I.

Deliberate Indifference Claim

We have recently reiterated that "summary judgment is inappropriate when there are issues of fact as to whether [a defendant in a § 1983/Eighth Amendment case] was aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed] and whether he actually dr[e]w the inference." *Woods v. Lecureux*, 110 F.3d 1215, 1224 (6th Cir. 1997) (quoting *Street v. Corrections Corp. of Am.*, 102 F.3d 810, 816 (6th Cir. 1996)) (internal quotation marks and citations omitted). In this matter, almost from the inception of the defendants' contacts with Lanthorn

shortly before his suicide, disturbing facts and occurrences presented themselves that could, in the estimation of a reasonable jury, support the plaintiffs' claims of obvious, imminent harm. After Lanthorn's arrest, for example, Officer Tim Hensley of the Johnson City Police Department noted that Lanthorn was foaming at the mouth.

Similarly, at the arrest scene, Dr. James Turnbull, the father of Sarah Lee, also noted that Lanthorn was foaming at the mouth and that Craig had mistakenly called Turnbull "Dr. Fenley," one of Lanthorn's physicians. Although Turnbull attributed Lanthorn's condition to drug use, he admits informing the police that the young man "obviously needs some medical attention." No such attention was forthcoming.

At the Johnson City jail, Lara Bolton processed Lanthorn's paperwork and noted that he suffered from anxiety and seizures and that he was taking the prescription drug Klonopin. Despite those danger signals, however, Bolton did not inquire further into Lanthorn's need for medical treatment. A few hours later, Lanthorn began screaming and kicking at his cell door. Officer Garland responded to the disturbance and observed Lanthorn flailing on his back, complaining that he was having a seizure, and requesting transport to the hospital. That request was denied, however, and a rescue team was summoned. Although the paramedics did not deem Lanthorn's condition serious enough to require transport, a member of the team did write that Garland should contact Lanthorn's physician for additional instructions about medication. Garland did not do so.

The day following Lanthorn's arrest, the pretrial detainee was transferred to the Washington County jail for

court proceedings. Officer Hensley again transported Lanthorn and, because of a conversation between the young man and other prisoners, he asked Lanthorn if he was contemplating suicide. Hensley testified that he made the inquiry based upon a feeling and Lanthorn's "high level of anxiety and upsetness." Because Lanthorn denied such thoughts, Hensley chose not to mention to Washington County jail officials the suicide talk, the bizarre behavior, the summoning of the rescue team, or Lanthorn's request for medical treatment.

Upon arriving at the Washington County facility, Lanthorn did explain to booking clerk Wanda Robertson that he was presently on medication for panic attacks, nerves, and seizures. Given that history and the prisoner's disoriented appearance, Robertson initially assigned Lanthorn to one of the county's suicide prevention cells. Lanthorn twice insisted, however, that he was not suicidal. Even though Robertson also overheard Lanthorn promise his mother that, upon his release, he would check into a psychiatric hospital, Robertson did not become overly concerned and, in fact, testified that she thought only that the prisoner had a drug or alcohol problem.

Before Lanthorn could be placed in the suicide watch cell, Officer Billy Mitchell heard Lanthorn's name being mentioned and recognized the prisoner as the individual Mitchell had transported to a Knoxville psychiatric hospital approximately one month earlier. Realizing that Lanthorn had required hospitalization on that prior occasion, Mitchell, at the direction of R.D. Jamerson, his immediate superior, engaged Lanthorn in conversation and later related that the prisoner claimed that he loved life and was preparing to care

for an infant who would be born soon. Based upon that discussion, despite having seen Lanthorn distraught while speaking with his mother on the telephone, without reviewing an assessment of Lanthorn's condition and complaints, and without consulting the booking card, Mitchell recommended that Lanthorn be transferred from the previously-assigned suicide prevention cell to a less-frequently monitored cell.

Based upon *these* facts alone, a reasonable jury could conclude that Garland and Mitchell were deliberately indifferent to Lanthorn's need for medical treatment. Consequently, summary judgment should not have been granted to the defendants on this claim.

II.

Failure To Train Claim

Despite the shocking nature of the individual defendants' inattention to warning signs and the outright disregard of requests by Lanthorn for medical care, such inaction is understandable when presented with evidence from which a jury could find that the municipal defendants unconstitutionally failed to train their employees adequately to spot such dangerous situations. In fact, defendant Garland intimated during his deposition testimony that although his personnel file indicates that he received the required number of hours in suicide prevention training, Johnson City actually falsified those reports so as to permit certification without the requisite instruction. Additionally, although both Johnson City and Washington County maintained suicide prevention guidelines in their jail manuals, defendant Mitchell testified

unequivocally that he had never seen the county's manual, despite employment in the jail facility.

Such evidence, if believed by a jury, would enable a plaintiff to establish a failure-to-train claim under the circumstances presented in this matter. The refusal of the district court and of the majority to permit examination of that evidence by a fact-finder thus justifies reversal of the summary judgment granted to the municipal defendants on plaintiffs' allegations.

III.

Excessive Force Claim

Similarly, the plaintiffs adduced proof that, if believed, would justify a jury in concluding that defendant Garland utilized excessive force in dealing with Lanthorn while Lanthorn claimed to be suffering from a seizure in the Johnson City jail. Deposition testimony established that while the pretrial detainee was flailing on the floor of a jail cell, Garland, who then weighed approximately 380 pounds, came into the cell and physically restrained the prisoner. Although Garland insists that he only placed his foot lightly on Lanthorn's leg between the ankle and shin in order to stop the thrashing, Lanthorn later claimed he had been beaten by Garland. Also, Dr. Cleland Blake testified in his deposition that his autopsy of the body of Craig Lanthorn revealed some bruising *in the buttocks area* "consistent" with a shoe print. Such divergent testimony again demands resolution, not in a ruling on a motion for summary judgment, but rather by a jury selected by the litigants to sift through the conflicting evidence.

IV.

In upholding the district court's grant of summary judgment to the defendants in this case, the majority gives credence to the evidence adduced by the city and county employees. Furthermore, in concluding that no reasonable person could have envisioned Lanthorn's need for medical treatment, the majority relies heavily upon statements made by Lanthorn's mother, without a personal visitation of her incarcerated son, in a letter she wrote seeking assistance in contacting a psychic to aid her in unraveling the events of Craig's final hours. A jury, presented with all relevant information in this case, might well concur in the result reached by the majority. Other evidence, however, supports a determination that the plaintiffs' allegations are well-founded. In our judicial system, it is only the appointed finders of fact that should be allowed to make the necessary credibility findings and analyses necessary to sort through such conflicting testimony. Out of respect for that system, I dissent from that part of the majority's decision removing the jury from its pre-eminent fact-finding role.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

[Filed August 4, 1998]

No. 2:95-CV-325

NANCY L. ELLIS, individually and as next friend of CATHERINE E. LANTHORN,
Plaintiffs,
v.

WASHINGTON COUNTY, TENNESSEE; SHERIFF FRED PHILLIPS, in his official capacity; R.D. JAMERSON, individually and in his official capacity; BILLY MITCHELL, individually and in his official capacity;

JOHNSON CITY, TENNESSEE; CHIEF OF POLICE RON STREET, in his official capacity; and SAM GARLAND, individually and in his official capacity,
Defendants.

MEMORANDUM

On September 18, 1997, the Court dismissed Plaintiffs' 42 U.S.C. § 1983 claims against all Defendants except R.D. Jamerson and reserved ruling on Plaintiffs' state law claims. (Court File No. 192). Jamerson subsequently filed a Motion to Alter or Amend (Court File No. 196) pursuant to *Fed R. Civ. P.* 59. Plaintiffs filed a response (Court File No. 205), and Jamerson filed a reply (Court File No. 212). Plaintiffs also filed a Motion to Alter or Amend (Court File Nos. 195, 235) pursuant to *Fed R. Civ. P.* 59(e) and 54(b). Defendants responded (Court File Nos. 236-239), and Plaintiffs replied (Court File No. 240). Finally, Plaintiffs filed a Motion to Supplement the Record (Court File No. 241), to which Johnson City responded (Court File No. 242).

The Court detailed the facts of this case in ruling on Defendants' summary judgment motions (Court File No. 191, pp.4-10) and will not repeat those facts here. For the following reasons, the Court will **DENY** Jamerson's Motion to Alter or Amend, **DENY** Plaintiffs' Motion to Alter or Amend, **DENY** Plaintiffs' Motion to Supplement the Record, **DISMISS** Plaintiffs' state law claims, and **ENTER** a **FINAL JUDGMENT** pursuant to *Fed. R. Civ. P.* 54(b) regarding all of Plaintiffs' claims except their § 1983 claim against Jamerson.

I. STANDARD OF REVIEW

A district court has considerable discretion whether to reopen a case under *Fed. R. Civ. P.* 59(e). *Edward H. Bohlin Co., Inc. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993); *Columbia Gas Transmission Corp. v. Limited Corp.*, 951

F.2d 110, 112 (6th Cir. 1991). The court must balance the need for finality with the need to render just decisions. *Edward IL. Bohlin Co., Inc.*, 6 F.3d at 355. However, "[i]n practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1, at 128 (2d ed. 1995); *see also Ruscavage v. Zuratt*, 831 F. Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

A Rule 59(e) motion is "aimed at *re*consideration, not initial consideration." *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (citations omitted). A party should not use the motion to "raise arguments which could, and should, have been made before judgment issued." *Id.* Thus, the motion should "either clearly establish a manifest error of law or must present newly discovered evidence." *Id.* Evidence brought to a court's attention under Rule 59(e) must have been previously "unavailable." *Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993); *Atlantic States Legal Foundation v. Karg Bros.*, 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (noting court is justified in reconsidering earlier ruling if "new evidence not previously available comes to light"). "Newly discovered evidence" is that which is "truly newly discovered or. . . could not have been found by due diligence." *Atlantic States*, 841 F. Supp. at 56 (citation omitted).

II. DEFENDANT JAMERSON'S MOTION TO ALTER OR AMEND

According to Jamerson, the Court erred in denying summary judgment based upon statements made by Sheriff England because those statements are inadmissible. Even if the statements are admissible, Jamerson contends all other admissible evidence in the case demonstrates Jamerson acted immediately when he observed Lanthorn hanging.

The Court will not weigh the evidence as Jamerson's latter argument suggests. At this stage of the litigation, the facts must be construed in the light most favorable to the Plaintiffs. Jamerson has not established a manifest error of law or presented newly discovered evidence. Instead, he has re-argued the admissibility of Sheriff England's statements. Consequently, Jamerson's Motion to Alter or Amend will be **DENIED.**

III. PLAINTIFFS' MOTION TO ALTER OR AMEND

Because Plaintiffs have not identified newly discovered evidence,[1] the Court will consider only whether their Motion to Alter or Amend establishes a manifest error of law. Plaintiffs re-argue several points raised in response to

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[1] Plaintiffs move to supplement the record in order to correct "misstatements" made by Defendants. (Court File No. 241). Because the Court has not reconsidered the facts in reviewing the Motions to Alter or Amend, supplementing the record is unnecessary. Any alleged misstatements by Defendants in responding to Plaintiffs' Amended Motion to Alter or Amend were not relied upon by the Court to decide the motion.

Defendants' summary judgment motions. The Court will not revisit those issues, except to the extent necessary to clarify the record. Plaintiffs advance four arguments in support of their Motion to Alter or Amend which require discussion.

First, Plaintiffs contend the Court erred in concluding Defendants are entitled to qualified immunity because Defendants were not performing a discretionary function. According to Plaintiffs, the Court erroneously applied the Michigan state law definition of discretionary function articulated in *Davis v. Holly*, 835 F.2d 1175 (6th Cir. 1987), rather than referring to Tennessee law on the issue. Plaintiffs urge the Court to apply the definition of discretionary function found in *Bowers v. Chattanooga,* 826 S.W.2d 427 (Tenn. 1992). The Court considered this argument in deciding the summary judgment motions, but concluded federal law defines discretionary function for purposes of qualified immunity in a § 1983 action. Plaintiffs are correct in noting *Davis* defined discretionary acts by quoting from a decision of the Michigan Supreme Court. 835 F.2d at 1178. Plaintiffs fail to recognize, however, the underlying facts of *Davis* occurred in Ohio. Following Plaintiffs' logic, the *Davis* court should have applied Ohio law. Viewed in context, the *Davis* court's use of Michigan law is no different than quoting a treatise or persuasive authority from another federal jurisdiction. *Davis* has not been overruled and has been cited by the Sixth Circuit with approval in several subsequent decisions. *See,* e.g., *Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir. 1991). Because Plaintiffs have submitted no authority convincing the Court that *Davis* is an incorrect statement of the law, the Court finds Plaintiffs' argument without merit.

Second, Plaintiffs contend there is a genuine issue of material fact regarding whether Defendant Garland used excessive force against Lanthorn. According to Plaintiffs, they have submitted a videotape which proves Garland was the only jailer out of sight of the cameras during the relevant time period; therefore, Garland was the only jailer who could have inflicted Lanthorn's injuries. Plaintiffs also referenced this videotape in response to Garland's summary judgment motion (Court File No. 155, p.5), but failed to submit the videotape to the Court. Consequently, the Court found Plaintiffs' summary reference to the videotape insufficient to identify Garland as the assailant. (Court File No. 191, p.26). The Court granted summary judgment to Garland because Plaintiffs failed to identify Garland as the individual who bruised Lanthorn. In their Motion to Alter or Amend, Plaintiffs assert the Court erred in reaching this conclusion because the facts supported by the videotape had never been in dispute. The Court notes, however, in response to Garland's summary judgment motion, Plaintiffs argued, "Although Defendants seek to exclude Craig Lanthorn's statements identifying Sam Garland as the jailer who used excessive force, other evidence corroborates that identification." (Court File No. 155, p.5). Plaintiffs then listed several items of evidence, including the videotape. Given Plaintiffs' statement, it is clear Plaintiffs recognized there was a disputed issue concerning whether Garland was Lanthorn's assailant and attempted to use the videotape to prove that point. The Court carefully reviewed all evidence submitted in support of Plaintiffs' excessive force claim, but concluded the evidence was insufficient to preclude summary judgment. Because there is no assertion the videotape is newly discovered evidence, the Court will not revisit this issue at this stage of the proceedings.

Third, Plaintiffs argue the cases relied on by the Court in granting summary judgment – *Danese v. Asman,* 875 F.2d 1239 (6th Cir. 1989), *cert. denied,* 110 S. Ct. 1473 (1990); *Barber v. City of Salem,* 953 F.2d 232 (6th Cir. 1992); and *Horn v. Madison County,* 22 F.3d 653 (6th Cir.), *cert. denied,* 115 S. Ct. 199 (1994) – were implicitly overruled by *Farmer v. Brennan,* 114 S. Ct. 1970 (1994). The Court considered the impact of *Farmer* in deciding Defendants' summary judgment motions, but concluded *Farmer* did not overrule *Danese, Barber,* or *Horn.* Plaintiffs' Motion to Alter or Amend does not compel a different conclusion.

In *Farmer,* the United States Supreme Court rejected the petitioner's proposed objective test and clarified the law by adopting a subjective test for deliberate indifference:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

114 S. Ct. at 1979. This clear recognition of a subjective component certainly did not ease the burden of proving deliberate indifference and arguably made the test more stringent. The Sixth Circuit's test for deliberate indifference in *Danese, Barber*, and *Horn* does not conflict with *Farmer,* but represents a permissible application of the test to a particular claim: failure to screen for suicidal tendencies.

Plaintiffs assert three cases – *Viero v. Bufano*, 925 F. Supp. 1374 (N.D. Ill. 1996); *Estate of Olivas*, 929 F. Supp. 1329 (D. Col. 1996); and *Williams v. Jabe*, 947 F. Supp. 1130 (E.D. Mich. 1996) – demonstrate that *Farmer* implicitly overruled *Danese*. (Court File No. 235, p. 10). After careful review of their reasoning, the Court is not persuaded these cases demonstrate implicit overruling *of Danese*. *See Viero*, 925 F. Supp. at 1382 (asking whether there was "strong likelihood" inmate would attempt suicide); *Estate of Olivas*, 929 F. Supp. at 1333, 1336 (citing *Barber* and considering whether pretrial detainee presented a "specific risk" that he would kill himself); *Jabe*, 947 F. Supp. at 1132, 1136 (quoting *Barber* with approval and distinguishing *Barber* on factual grounds, rather than reasoning *Barber* was overruled by *Farmer*).

Finally, Plaintiffs contend *Williams v. Mehra*, 135 F.3d 1105 (6th Cir. 1998),[2] which was decided after the Court disposed of the summary judgment motions in this case, requires the Court to view Plaintiffs' claim as an assertion of the right to adequate medical care, rather than the right to be screened for suicidal tendencies. Again, the Court disagrees. In *Williams*, the decedent committed suicide while he was an inmate in a state prison. While he was a pretrial detainee in the county jail, the decedent had attempted suicide by overdosing on prescription tablets he had hoarded. The decedent was subsequently given liquid medication. After he was sentenced and transferred to the state prison, the decedent was given tablet medication again. The decedent committed

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[2] On May 21, 1998, the Sixth Circuit vacated the *Williams* opinion and granted rehearing en banc. 144 F.3d

suicide by overdosing on the medication. As a result, the plaintiff filed a § 1983 action against three of the state prison's psychiatrists.

The *Williams* court reversed and remanded for an order of dismissal as to one defendant, reasoning the defendant did not have sufficient information to "appreciate the gravity of decedent's serious risk of suicide." *Id.* at 1114. The court affirmed denial of qualified immunity to the remaining two defendants because they knew the decedent had previously attempted suicide and been placed on liquid medication, continued to have suicidal thoughts, had a suicide plan, and intended to wait until after sentencing to carry out the plan. *Id.* The defendants also had a report which indicated the decedent was a "moderate potential risk for suicide." *Id.*

The defendants in *Williams* argued the right involved was the right to be screened for suicidal tendencies, but the court determined the right at issue was the decedent's right to receive necessary psychiatric care. *Id.* at 1112. The court noted:

> Defendants rely principally on this Court's decisions in *Horn v. Madison County Fiscal Court,* 22 F.3d 653 (6th Cir. 1994), *Rich v. City of Mayfield Heights,* 955 F.2d 1092 (6th Cir. 1992), and *Danese v. Asman,* 875 F.2d 1239 (6th Cir. 1989). However, in those cases this Court addressed the right of pretrial and juvenile detainees to be screened by the city and police officials for a detainee's suicidal tendencies. None of those cases, however,

> applied to the failure of a psychiatrist to render an inmate the necessary medical treatment required to respond to his psychiatric disorders.
>
> Further, the case at bar does not involve the failure to screen for suicidal tendencies as Defendants would believe. Here, decedent was indeed screened for such tendencies and was determined to be moderately suicidal. This is a case of whether the alleged failure of psychiatrists, who were sufficiently trained to provide necessary treatment to decedent's serious psychiatric needs (the risk of suicide), consciously disregarded those needs in violation of the Eighth Amendment. Thus, to so particularize the right as Defendants would like, would in essence "allow appellants, and future defendants, to define away all potential claims." *See, e.g., Newell v. Sauser,* 79 F.3d 115, 117 n. 3 (9th Cir. 1996).

135 F.3d at 1112.

Significantly, the court distinguished *Danese* and *Horn*, rather than finding those cases were overruled by *Farmer*. For the same reasons the *Williams* court distinguished *Danese* and *Horn*, this case is distinguishable from *Williams*. Plaintiffs argue this is not a screening case because it is undisputed Lanthorn was screened for suicidal tendencies and found to be a suicide risk; therefore, *Williams* applies. (Court File No. 235, p. 5). The Court finds Plaintiffs' argument unsupported by the record. The central

disputed issue in this case is whether Defendants were aware Lanthorn might commit suicide. Like Danese and *Horn*, this case involves a pretrial detainee's right to be screened by the city and police officials for suicidal tendencies.

Having carefully considered Plaintiffs' arguments concerning *Farmer* and *Williams*, the Court remains convinced *Danese, Barber*, and *Horn* apply to this case and support the Court's decision to grant summary judgment with respect to all Defendants except Jamerson. Therefore, the Court will **DENY** Plaintiffs' Motion to Alter or Amend Judgment.

IV. STATE LAW CLAIMS

In ruling on Defendants' summary judgment motions, the Court reserved ruling on Plaintiffs' state law claims. Defendants Johnson City and Washington County subsequently filed a joint Motion to Dismiss Plaintiffs' state law claims. (Court File No. 222). The Court will now consider those claims.

According to Johnson City and Washington County, the Court does not have jurisdiction to hear Plaintiffs' wrongful death claims because they are brought pursuant to the Tennessee Governmental Tort Liability Act ("TGTLA"), which vests exclusive jurisdiction in the state courts in the following provision: "The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter and shall hear and decide such suits without the intervention of a jury. . . ." Tenn. Code Ann. § 29-20-307. To apply this provision, it is necessary to determine what

actions arise under the TGTLA. The following provisions delineate coverage of the TGTLA, as if relates to this action:

> (a) The court, before holding a governmental entity liable for damages, must first determine that the employee's or employees' act or acts were negligent and the proximate cause of plaintiff's injury, that the employee or employees acted within the scope of their employment and that none of the exceptions listed in § 29-20-205 are applicable to the facts before the court.
>
> (b) No claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter. . . .

Tenn. Code Ann. § 29-20-310.

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury. . . [a]rises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. . . .

Tenn. Code Ann. § 29-20-205(1).

Under these provisions, a governmental entity may be sued for the negligent act of an employee, unless the employee was performing a discretionary function when the negligence occurred. If the governmental entity is subject to liability, the employee is not subject to liability. Conversely, if the governmental entity is not subject to liability, the employee may be liable. Therefore, this case generally presents two possibilities: (1) The individual defendants were not performing discretionary functions when the negligence occurred, so Johnson City and Washington County may be subject to liability, but the individual defendants are not; or (2) The individual defendants were performing discretionary functions when the negligence occurred, so the immunity of Johnson City and Washington County is not removed; therefore, only the individual defendants are subject to liability.

At the summary judgment stage of this action, Johnson City argued it was immune from suit under the TGTLA because its employees were performing discretionary functions. In contrast, the individual Defendants argued they were not performing a discretionary function, as that term is defined for purposes of the TGTLA. In the joint motion presently before the Court, Johnson City reverses its position and specifically concedes it is not immune from suit under the TGTLA. Because Washington County has never argued it is immune under the TGTLA and has joined Johnson City's motion, it is reasonable to assume Washington County also concedes it is not immune from suit under the TGTLA.

Moreover, for purposes of analyzing Plaintiffs' state law claims, the Court finds the individual Defendants were not performing discretionary functions when the alleged

negligence occurred. The definition of discretionary under the TGTLA is not the same as under § 1983. In the following passage, the Tennessee Supreme Court adopted a planning-operational test to define discretionary function under the TGTLA:

> Under the planning-operational test, decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity. The distinction between planning and operational depends on the type of decision rather than merely the identity of the decision maker. . . .
>
> Under the planning-operational test, discretionary function immunity does not automatically attach to all acts involving choice or judgment. Such an analysis recognizes that, to some extent, every act involves discretion. . . .
>
> A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision.

> These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules.
>
> On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Tort Liability Act. . . .

Bowers v. City of Chattanooga, 826 S.W.2d 427, 430-31 (Tenn. 1992) (citations omitted).

Even when the evidence is viewed in the light most favorable to the Plaintiffs, the acts in this case do not rise to the level of planning or policy making. Consequently, the Court holds the individual Defendants were not performing discretionary acts. Because the individual Defendants were not performing discretionary acts, the exception in § 29-20-205 does not apply. Therefore, the immunity of Johnson City and Washington County is removed, and the individual Defendants are not subject to liability. Accordingly, the Court will DISMISS Plaintiffs' state law claims against the individual Defendants.

As previously noted, in the instant joint motion, Johnson City and Washington County argue this Court lacks subject matter jurisdiction over Plaintiffs' state law claims because the state courts have exclusive jurisdiction over TGTLA claims. *Timberlake v. Benton,* 786 F. Supp. 676, 696 (M.D. Tenn. 1992); *Beddingfield v. City of Pulaski,* 666 F. Supp. 1064, 1066-67 (M.D. Tenn. 1987). Plaintiffs urge the Court to exercise supplemental jurisdiction over their state law claims, pursuant to 28 U.S.C. § 1367 ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ."). According to Plaintiffs, the TGTLA may be interpreted as limiting where an action may be brought in state court – *i.e.*, circuit court but not chancery court – rather than as limiting federal jurisdiction. Plaintiffs do not convincingly distinguish *Timberlake* or *Beddingfield*, but argue the holdings of those cases are stated in qualified terms. (Court File No. 225).

Based upon the reasoning in *Timberlake* and *Beddingfield*, the Court will **GRANT** Defendants' motion to dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction. Additionally, the Court notes declining to exercise supplemental jurisdiction in this case is proper under 28 U.S.C. § 1367(c)(4) because there are compelling reasons for declining jurisdiction. The deliberate indifference standard applicable to Plaintiffs' remaining § 1983 claim against Jamerson differs greatly from the negligence standard applicable to Plaintiffs' wrongful death claim. This difference would likely confuse a jury. Moreover, given the applicability of the TGTLA, federalism concerns counsel against retaining jurisdiction.

V. CERTIFICATION UNDER *FED. R. CIV. P.* 54.(B)

Plaintiffs ask the Court to enter final judgment pursuant to *Fed. R. Civ. P.* 54(b), which provides:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . .

According to Plaintiffs, if the Court denies their Motion to Alter or Amend, allowing Plaintiffs to appeal immediately at the same time Jamerson appeals the denial of qualified immunity would minimize the potential for multiple trials or appeals.

The Sixth Circuit has succinctly explained the operation of Rule 54(b):

> Rule 54(b) of the Federal Rules of Civil Procedure permits immediate review of certain district court orders prior to the ultimate disposition of a case. Although Rule 54(b) relaxes the traditional finality requirement for appellate review, it does not tolerate immediate appeal of every action taken by a district court. The rule is specifically "designed to facilitate the entry of judgment on one or more claims,

or as to one or more parties, in a multi-claim/multi-party action."

Rule 54(b) certification requires two independent findings. First, the district court must expressly "direct the entry of final judgment as to one or more but fewer than all the claims or parties" in a case. Second, the district court must "express[ly] determin[e] that there is no just reason" to delay appellate review. A district court certifying an order under Rule 54(b) must clearly explain why it has concluded that immediate review of the challenged ruling is desirable.

The first step in certification, entry of partial final judgment, is satisfied where some decision made by the district court ultimately disposes of one or more but fewer than all of the claims or parties in a multi-claim/multi-party action. . . .

The second step in certification, determination of no just reason for delay, requires the district court to balance the needs of the parties against the interests of efficient case management. "Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." Courts implementing Rule 54(b) must "strike a balance between the undesirability of more than one appeal in a single action and the need

> for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants." By limiting interlocutory appeals under Rule 54(b) to "infrequent harsh case[s]," courts can alleviate hardship resulting from unnecessary delay without undermining "the historic federal policy against piecemeal appeals."

General Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1026 (6th Cir. 1994).

Defendants oppose Rule 54(b) certification while state law claims are still pending. Implicit in this argument is a lack of opposition to Rule 54(b) certification if the state law claims are dismissed. In light of the decision to dismiss Plaintiffs' state law claims, the Court finds certification under Rule 54(b) is appropriate. First, the Court has entered a partial final judgment by ultimately disposing of all of Plaintiffs' claims except the § 1983 claim against Defendant Jamerson. Second, there is no just reason for delay. Jamerson is entitled to appeal the denial of qualified immunity and has indicated he will do so if his Motion to Alter or Amend is denied. Allowing Plaintiffs to appeal the Court's adverse decision on qualified immunity does not undermine the policy against piecemeal appeals, but promotes judicial efficiency by allowing a consolidated appeal concerning qualified immunity. Jamerson's right to immediately appeal the denial of qualified immunity makes this a rare case. Therefore, the Court will direct entry of a final judgment as to all of Plaintiffs' claims except Plaintiffs § 1983 claim against Defendant Jamerson. *Fed. R. Civ. P.* 54(b).

VI. CONCLUSION

For the reasons set forth above, the Court will **DENY** Jamerson's Motion to Alter or Amend, **DENY** Plaintiffs' Motion to Alter or Amend, **DENY** Plaintiffs' Motion to Supplement the Record, **DISMISS** Plaintiffs' state law claims, and **ENTER** a **FINAL JUDGMENT** pursuant to *Fed R. Civ. P.* 54(b) regarding all of Plaintiffs' claims except their § 1983 claim against Jamerson.

An appropriate order shall enter.

/s/ _____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

[Filed August 4, 1998]

No. 2:95-CV-325

NANCY L. ELLIS, individually and as next friend of CATHERINE E. LANTHORN,
Plaintiffs,

v.

WASHINGTON COUNTY, TENNESSEE; SHERIFF FRED PHILLIPS, in his official capacity; R.D. JAMERSON, individually and in his official capacity; BILLY MITCHELL, individually and in his official capacity;

JOHNSON CITY, TENNESSEE; CHIEF OF POLICE RON STREET, in his official capacity; and SAM GARLAND, individually and in his official capacity,
Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum, the Court **DENIES** Jamerson's Motion to Alter or Amend (Court File No. 196), **DENIES** Plaintiffs' Motion to Alter or Amend (Court File No. 195), **DENIES** Plaintiffs' Motion to Supplement the Record (Court File No. 241), and **DISMISSES** Plaintiffs' state law claims. Additionally, pursuant to *Fed. R. Civ. P.* 54(b), the Court **DIRECTS** entry of **FINAL JUDGMENT** regarding all of Plaintiffs' claims except their § 1983 claim against Defendant Jamerson.

SO ORDERED.

ENTER:

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

[Filed September 18, 1997]

No. 2:95-CV-325

NANCY L. ELLIS, individually and as next friend of CATHERINE E. LANTHORN,
Plaintiffs,
v.

WASHINGTON COUNTY, TENNESSEE; SHERIFF FRED PHILLIPS, in his official capacity; R.D. JAMERSON, individually and in his official capacity; BILLY MITCHELL, individually and in his official capacity;

JOHNSON CITY, TENNESSEE; CHIEF OF POLICE RON STREET, in his official capacity; and SAM GARLAND, individually and in his official capacity,
Defendants.

MEMORANDUM

This case centers around the death of Craig Lanthorn, Plaintiff Nancy L. Ellis's son and Plaintiff Catherine E. Lanthorn's father. Mr. Lanthorn committed suicide while held in the Washington County jail. Plaintiffs bring federal civil rights claims based on 42 U.S.C. § 1983, as well as wrongful death claims based on state law.

Each of the Defendants has filed a summary judgment motion. (Johnson City, Court File No. 93; Mitchell, Court File No. 96; Jamerson, Court File No. 98; Washington County, Court File No. 102; Garland, Court File No. 106). Plaintiffs have filed a sixty-seven page collective response to these motions (Court File No. 124), and Defendants have filed separate replies (Mitchell, Court File No. 138; Jamerson, Court File No. 144; Garland, Court File No. 145; Washington County, Court File No. 148; Johnson City, Court File No. 149). Plaintiffs have also filed a separate supplemental response with respect to each defendant (Court File Nos. 152, 155, 156, 157, 158), and Defendants have replied in kind (Mitchell, Court File No. 159; Johnson City, Court File No. 161; Jamerson, Court File No. 162; Garland, Court File No. 171; Washington County, Court File No. 174).[1]

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[1] Defendants have moved to strike Plaintiffs' supplemental responses. Because Defendants have availed themselves of the opportunity to file supplemental replies, which the Court has considered, the Court hereby **DENIES** the motion to strike. However, the Court discourages the parties from utilizing this ping pong briefing strategy in the future. The interests of their clients would be better served by one well written and annotated

For the following reasons, the Court will **GRANT** the summary judgment motions of Defendants Washington County, Johnson City, Garland, and Mitchell to the extent they seek dismissal of Plaintiffs' § 1983 claims, **DENY** Defendant Jamerson's summary judgment motion with respect to Plaintiffs' § 1983 claim, and defer ruling on the portions of Defendants' summary judgment motions dealing with Plaintiffs' state law claims.

I. STANDARD OF REVIEW

Although some Defendants have argued Plaintiffs' claims should be dismissed pursuant to *Fed. R. Civ. P.* 12(b)(6), all parties have submitted extensive evidence outside the pleadings. Therefore, the Court will review all motions under the summary judgment standard. *Fed. R. Civ. P.* 12(b).

Under *Fed. R. Civ. P.* 56(c), the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.,* 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow,* 44 F.3d 426,429 (6th Cir. 1995); *City*

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memorandum discussing all relevant issues.

Management Corp. v. U.S. Chemical Co., Inc., 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411; *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-06 (6th Cir. 1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fairminded jury could not return a

verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy,* 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411.

II. FACTUAL ALLEGATIONS

Viewing the evidence in the light most favorable to Plaintiffs, the facts are as follows. On August 2, 1994, Johnson City police officer Tim Hensley arrested Craig Lanthorn for public intoxication and criminal trespassing. (Complaint, Court File No. 1, ¶ 12). Officer Hensley responded to a call to the home of Dr. James Turnbull, the father of Sarah Turnbull, Lanthorn's former girlfriend. Officer Hensley transported Lanthorn to the Johnson City jail.

Lara Bolton was the "booking" officer at the Johnson City jail. According to Officer Bolton, Lanthorn was highly intoxicated, slurred his speech, had a sloppy gait, was "kinda dirty," was "all over the counter," and was wearing a toboggan and long sleeved shirt in August. (Bolton Depo., Court File No. 124, pp. 29-30, 60). Officer Bolton also described Lanthorn as "disoriented" and "not fully alert." *(Id.* at 61-62, 77). On Lanthorn's booking card, Officer Bolton noted Lanthorn was under treatment for anxiety and seizures, taking the prescription medication Klonopin, and under the care of a particular physician. *(Id.* at 33). Officer Bolton did not attempt to contact Lanthorn's physician or check on his medication. *(Id.* at 33-34). After the booking was complete, Lanthorn was placed in the "drunk tank."

Sometime later, Officer Bolton heard noise coming from Lanthorn's cell and asked Officer Sam Garland, one of the defendants in this case, to check on Lanthorn. *(Id.* at 38).

Defendant Garland found Lanthorn lying on his back in the cell, kicking and screaming that he was having a seizure and wanted to go to the hospital. (Garland Depo., Court File No. 124, pp. 45, 48, 56-57, 139). In a statement to the Federal Bureau of Investigation, Garland described Lanthorn as "kicking uncontrollably" and "flopping his body about in a wild manner." (Exh. 1, Court File No. 124). In his deposition, Garland indicated he thought Lanthorn was "not all there" during this kicking episode in the drunk tank. (Garland Depo., Court File No. 124, p.p. 144-45).

Garland told Officer Bolton to call the Rescue Squad, went back to his office, and a few minutes later heard noise coming from Lanthorn's cell again. *(Id.* at 50-51). According to Garland, he went to Lanthorn's cell, opened the door, and Lanthorn kicked him. *(Id.* at 51). Garland avers he placed his foot between Lanthorn's ankle and shin and told Lanthorn to calm down. *(Id.* at 51-53). At the time of this incident, Garland weighed 380 pounds. *(Id.* at 55).

Garland admits, when the Rescue Squad arrived, Lanthorn told them he had been kicked in the back by an officer. *(Id.* at 63-64). Doug Green, the emergency medical technician who responded to Officer Bolton's call, completed a report which states in relevant part:

> Upon arrival found pt sitting in fetal position in jail cell. Officer S. Garland stated pt was laying in floor kicking and foaming @ mouth. Upon exam found pt alert but very anxious. Pupils were equal and reactive, skin was dry, warm, normal in color. Pt had smell of ETOh on breath. Advised pt to slow down his

> respirations. Pt stated he had hx of anxiety attacks. Advised Officer S. Garland to contact pt physician to advise on situation.

(Exh. H, Court File No. 124).

Green testified he told Garland to call Lanthorn's physician "[t]o check on his medications to see if he needed his medications to keep his therapeutic levels up." (Green Depo., Court File No. 124, p. 52). Green further testified he offered to transport Lanthorn to the hospital, but Lanthorn refused transport and requested medication. *(Id.* at 52-54). Plaintiffs point out, however, Garland signed the Rescue Squad form on a line reserved for a patient or surrogate to refuse transport by ambulance and release all claims against the Rescue Squad. (Exh. H). According to Garland, the Rescue Squad indicated Lanthorn was not having a seizure, but Garland should keep an eye on Lanthorn and call the Rescue Squad back if his condition changed. (Garland Depo., Court File No. 124, pp. 67-68).

The following day, Garland took Lanthorn to a hearing before a judge. Garland testified Lanthorn told the judge "[h]e had been beat up twice by two officers." *(Id.* at 124). Lanthorn apparently did not specify where or when the beatings took place. *(Id.)*. Garland also testified Lanthorn, during the previous night, had torn up a phone book and scattered it all over his cell. *(Id.* at 118).

After his appearance before the judge, Garland took Lanthorn to the booking office to be prepared for transport to the Washington County jail. Garland witnessed other transportees teasing Lanthorn about "going to the big house."

(Id. at 129-30). Lanthorn was transported to the Washington County jail on August 3, 1994.

Hubert Castle was the desk officer on duty when Lanthorn came into the Washington County jail. When Lanthorn came in the door, Castle had to "call him down" because he was "jumping up and down." (Castle Depo., Court File No. 124, p. 44). Lanthorn was "very upset" because he believed his wallet had not been returned when he left the Johnson City jail. *(Id.* at 44-45). According to Castle, Lanthorn calmed down after Castle instructed him to do so. *(Id.* at 45).

The transporting Johnson City officer asked Castle if anyone had called about Lanthorn. *(Id.* at 46-47). Castle replied in the negative and asked "if there was a potential problem." *(Id.* at 47). The Johnson City officer did not "really know" what the problem was, but indicated someone from Johnson City would call. (*Id.*).[2]

Lanthorn was then taken upstairs to the booking officer, Wanda Robertson. According to Robertson, Lanthorn was "unkept, hair not combed, maybe not shaved, clothes rumpled." (Robertson Depo., Court File No. 124, p. 48). Robertson also testified Lanthorn stated a Johnson City jailer told him he would be "locked down with nothing" because he was yelling; asked if he would actually be locked down with nothing; and stated he was "not suicidal," "loved life," and

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[2] Castle never received a call from Johnson City. *(Id.)*.

wanted a cigarette.[3] *(Id.* at 51-53). Robertson noted Lanthorn appeared disoriented, was agitated, appeared to be under the influence of alcohol or drugs, and was unsteady on his feet. *(Id.* at 58-59, 110-11). Lanthorn told Robertson he was on medication for panic attacks, seizures, and nerves, and that he was under the care of Dr. Patel and Dr. Finley. *(Id.* at 70-71). After the booking interview, Robertson assigned Lanthorn to cell T-3, the suicide watch cell. *(Id.* at 68, 74).

While the booking interview was conducted upstairs, Defendant Billy Mitchell came in downstairs. Approximately three weeks earlier, Mitchell had transported Lanthorn to Lakeshore Mental Hospital for an involuntary commitment. Mitchell picked Lanthorn up at the Medical Center emergency room, put leg irons on him, and took him to Lakeshore. (Mitchell Depo., Court File No. 124, pp. 56-59). During the transport, Lanthorn told Mitchell he had been raped, his girlfriend was pregnant, and he had thoughts of hurting himself, but did not want to do so. *(Id.* at 60-61, 68-69). According to Mitchell, the doctors at Lakeshore evaluated

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[3] Robertson explained:

> Locked down with nothing probably referred to what he said Johnson City had told him, which is what they say with a suicide cell. You're locked down and not given anything. You can't have anything other than the basics, a mat and a blanket, a sheet, whatever.

(Id. at 52). Robertson further explained "locked down with nothing" could also refer to a "disciplinary cell." *(Id.* at 53).

Lanthorn and said they were going to keep him, so Mitchell took his leg irons and went home. *(Id.* at 61).[4]

After Mitchell came in downstairs, he heard Hubert Castle and Sergeant R.D. Jamerson, Mitchell's superior officer and a defendant in this case, discussing the inmates Johnson City had brought over that day. When Craig Lanthorn's name was mentioned, Mitchell told Jamerson he had transported Lanthorn to Lakeshore approximately one month earlier and that Lakeshore "kept" Lanthorn. *(Id.* at 70). Mitchell also told Jamerson that, during the transport to Lakeshore, Lanthorn told Mitchell "he wasn't really trying to kill himself; that he just wanted some help." (Jamerson Depo., Court File No. 124, p. 42). According to Mitchell, Hubert Castle then mentioned the Johnson City jail had "problems" with Lanthorn because he was "screaming and hollering." (Mitchell Depo., Court File No. 124, pp. 73-74).

At that point, Jamerson directed Mitchell to go upstairs and determine whether Lanthorn needed to be on suicide watch or could be placed in cell B-4, the cell that was least full that day. *(Id.* at 75-78). Mitchell went upstairs to speak with Lanthorn, but Lanthorn was on the phone with his mother, was upset, and appeared to have been crying. *(Id.* at 81-82).

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[4] Plaintiffs assert Mitchell, in a statement to the Tennessee Bureau of Investigation ("TBI"), admitted a nurse at Lakeshore told him Lanthorn was being committed because he was suicidal. *(See* Court File No. 124, p. 9 and Exh. E). The Court notes, however, the TBI report indicates Mitchell stated a nurse in the Medical Center emergency room told him "Lanthorn wanted to hurt himself." *(Id.* at Exh. E).

Several minutes later, after Lanthorn had been placed in a holding cell, Mitchell returned to speak with him. According to Mitchell, he asked Lanthorn if he was suicidal, and Lanthorn replied, "H--, no. I love life. I've got a baby on the way that I've got to take care of." *(Id.* at 83). Lanthorn also asked Mitchell about the charges he was facing and asked to be placed in a smoking cell. *(Id.* at 87-89).

At that point, without reviewing the booking card or discussing Lanthorn's condition with Robertson, Mitchell told Officer John Cline that Lanthorn could go to cell B-4. *(Id.* at 88-89). According to Robertson, Mitchell told her Lanthorn would be "okay" in B-4 with the camera. (Robertson Depo., Court File No. 124, p. 76).

Lanthorn was placed in cell B-4, which was equipped with a camera. The camera was not monitored at all times. In contrast, the suicide watch cell, T-3, was monitored at all times by a trustee inmate. (Mitchell Depo., Court File No. 124, pp. 22, 30, 34-36).

Hubert Castle was stationed in the room with the monitor for the B-4 camera. According to Castle, it had been at least fifteen or twenty minutes since he looked at the monitor when Jamerson came into the room and told Castle there was something going on in B-4. (Castle Depo., Court File No. 124, pp. 51-53). Castle then looked at the monitor and saw Lanthorn hanging from a horizontal bar above the door to his cell. *(Id.* at 51-52). The noose around Lanthorn's neck had been fashioned from a bed sheet.

Plaintiffs contend Jamerson saw Lanthorn tie the noose around the bar at 1:45 p.m., but an emergency medical team

was not called until 1:56 p.m. (Court File No. 124, pp. 26-27). Plaintiffs also contend Jamerson did not notify other jailers of the problem until 1:55 p.m. Lanthorn died at the hospital the next day, August 4, 1994.

III. OFFICIAL CAPACITY CLAIMS

The individual Defendants argue all claims against them in their official capacity should be dismissed. The Court notes a suit against an individual in his official capacity is the equivalent of a suit against the governmental entity employing him. *Matthews v. Jones,* 35 F.3d 1046, 1049 (6th Cir. 1994); *Barber v. City of Salem, Ohio,* 953 F.2d 232, 237 (6th Cir. 1992). Therefore, Plaintiffs' official capacity claims will be resolved by the Court's decision regarding Washington County and Johnson City.

IV. SECTION 1983

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983 (Supp. 1997). "To successfully state a claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation

of that right by a person acting under color of law." *Adams v. Metiva,* 31 F.3d 375, 386 (6th Cir. 1994) (citation omitted). Thus, an important threshold step in analyzing Plaintiffs' claims is determining what constitutional rights Plaintiffs allege Craig Lanthorn was denied.

The United States Supreme Court has determined pretrial detainees such as Lanthorn are entitled to the same constitutional rights as convicted prisoners. *Bell v. Wolfish,* 99 S. Ct. 1861, 1877 (1979). Prisoners have an Eighth Amendment right to be free from cruel and unusual punishment. Therefore, prisoners have a right to adequate medical care. *Estelle v. Gamble,* 97 S. Ct. 285, 291 (1976). Although this Eighth Amendment analysis is not applicable to detainees, they have an analogous right. *Danese v. Asman,* 875 F.2d 1239, 1242-43 (6th Cir. 1989), *cert. denied,* 110 S. Ct. 1473 (1990). "[U]nder due process of law, pretrial detainees may not be punished because they have not yet been judged guilty." *Id.* at 1242. Therefore, "jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish." *Id.* at 1243. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Oklahoma v. Brown, 117 S.* Ct. at 1391.

The Supreme Court has also determined prisoners have a liberty interest in personal security and a due process right to be free from unjustified intrusions on personal security. *Youngberg v. Romeo,* 102 S. Ct. 2452, 2457-58 (1982). Consequently, the Constitution requires jail officials to exercise professional judgment as to the conditions of a

prisoner's confinement, *id.* at 2462. Finally, the Supreme Court has recognized a pretrial detainee's right to be free, *Graham v. Conner,* 109 S. Ct. 1865, 1869-71 (1989) and to refrain from the use of excessive force. With these basic rights in mind, the Court will address Plaintiffs' specific claims against the individual defendants before turning to Plaintiffs' claims against Johnson City and Washington County.

A. Individual Liability

Each of the individual Defendants contends Plaintiffs' § 1983 claim against him should be dismissed because he is entitled to qualified immunity. "A government official performing a discretionary function is entitled to qualified immunity in his personal capacity where the official's action (or failure to act) does not violate constitutional standards in light of clearly established law at the time the official acted." *Barber v. City of Salem,* 953 F.2d 232, 236 (6th Cir. 1992).

The United States Supreme Court has succinctly explained the policy underlying qualified immunity:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald,* 457 U.S., at 814, 102 S. Ct., at 2736. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials

> in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987).

The Court further explained qualified immunity analysis must focus on a particularized constitutional right:

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow,* 457 U.S., at 819, 102 S. Ct., at 2739, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.,* at 818, 102 S. Ct., at 2738.
>
> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that

the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been

> held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 107 S. Ct. at 3038-39 (citations and footnote omitted).

The United States Court of Appeals for the Sixth Circuit has applied this particularized right principle in a jail suicide case. In *Danese v. Asman,* 875 F.2d 1239, 1242 (6th Cir. 1989), the plaintiff asserted two causes of action against individual officers: (1) "deprivation of Danese's fourteenth amendment due process right not to be punished while in pretrial detention" based on deliberate indifference to medical needs and (2) "deprivation of a fourteenth amendment due process right to be free from unsafe confinement."

Danese was arrested for driving while intoxicated. He "cried intermittently and made repeated remarks . . . that he wished he were dead." *Id.* at 1241. "Danese called his mother, and one of the officers noticed that Danese cried toward the end of the call." Id.

The jail officials removed Danese's belt and shoes and placed him in a cell which had horizontal bars and an inoperative television monitor. Between 5:15 and 5:25 a.m., an officer heard screaming and banging coming from Danese's cell. Danese asked for a cigarette, but the officer told him it was against jail rules. Danese replied "he would hang himself if he did not get one." *Id.* The officer said he was sorry and left.

At 5:56 a.m., Danese was found hanging by his shirt from a bar in his cell. The officers cut Danese down and summoned an ambulance, but Danese was dead within an hour.

The *Danese* court found the asserted rights to medical care and safe confinement were not particularized rights as required by *Anderson* and reasoned:

> The "right that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide. The general right to medical care, for example, is not sufficient to require a police officer to have known that he was seriously contemplating suicide and stop him from following through.

Danese, 875 F.2d at 1244. Because the court found there was no clearly established right to suicide prevention screening or facilities as of November 1982, it concluded the police officers were entitled to qualified immunity. *See Barber*, 953 F.2d at 236-37 (interpreting Danese).

The court recognized, however, "[t]he story might be different if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had told them he needed psychological help. If a prisoner asks for and needs medical care, it must be supplied." *Danese*, 875 F.2d at 1244; *see also Horn v. Madison County*, 22 F.3d 653, 660 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 199 (1994). ("A detainee's psychological needs may constitute serious medical needs, especially when they result in suicidal tendencies. . . .

Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference."). In a later case, the Sixth Circuit explained:

> [T]he proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section 1983 for a jail detainee's suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs.

Barber, 953 F.2d at 240.

The Sixth Circuit has also established a burden shifting paradigm with respect to qualified immunity:

> The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991). Defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question. *Id.* Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have clearly

> understood that they were under an affirmative duty to refrain from such conduct.

Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir. 1992).

Thus, as a preliminary matter, the Court must decide whether Defendants were performing discretionary acts. Discretionary acts involve "significant decision-making that entails personal deliberation, decision and judgment." *Davis v. Holly*, 835 F.2d 1175, 1178 (6th Cir. 1987) (noting defendants, in carrying out responsibilities of providing proper care and treatment, safe conditions of confinement, and personal security to mental hospital patients were "'almost inevitably . . . influenced by [their] experiences, values, and emotions'" and therefore performed discretionary functions) (citation omitted). In contrast, ministerial acts involve "the execution of or implementation of a decision and entail only minor decision-making." *Id.; cf. Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (finding nurse's compliance with doctor's prescription or treatment plan ministerial).

In determining whether Lanthorn needed medical care or needed to be placed in a suicide watch cell, Defendants exercised significant decision making authority. Their acts entailed personal deliberation, decision, and judgment. Therefore, the Court finds Defendants Garland, Mitchell, and Jamerson were performing discretionary functions.

Having determined Defendants have carried their initial burden, Plaintiffs must carry the ultimate burden of showing Defendants violated a clearly established right.

Plaintiffs contend Defendants Jamerson, Mitchell, and Garland were deliberately indifferent to Lanthorn's serious need for medical or psychological care. Additionally, Plaintiffs contend Defendant Garland violated Lanthorn's right to be free from the use of excessive force. For ease of discussion, the Court will address Plaintiffs' claims against each defendant separately.

1. Billy Mitchell

According to Plaintiffs, Mitchell was deliberately indifferent to Lanthorn's need for medical and psychological care because Mitchell knew he had transported Lanthorn to Lakeshore three weeks earlier for an involuntary commitment; at the time of the transport, Lanthorn told Mitchell he had been raped and had thoughts of hurting himself; Mitchell was aware of Lanthorn's domestic problems; Mitchell was aware Lanthorn had been crying and seemed upset and nervous; and Mitchell placed Lanthorn in cell B-4 without discussing Lanthorn's condition with Wanda Robertson, reviewing the booking card, or asking the facility nurse to examine Lanthorn. (Plaintiffs' Response, Court File No. 124, p. 42-46; Plaintiffs' Supplemental Response, Court File No. 156).

Plaintiffs have offered no evidence disputing Mitchell's contention he asked Lanthorn if he was suicidal, nor have Plaintiffs introduced evidence Lanthorn told Mitchell he was suicidal while he was in the Washington County jail or Lanthorn asked Mitchell for any type of medical care.

The Court finds Lanthorn did not exhibit to Mitchell such a strong likelihood he would attempt to take his own life that failure to take adequate precautions amounted to

deliberate indifference. Viewing all Plaintiffs' evidence in the most favorable light, the most that can be said about Mitchell is he knew Lanthorn had been suicidal in the recent past. In contrast, the defendants in *Danese* were entitled to qualified immunity even though the decedent threatened suicide while he was in jail. Consequently, the Court finds Mitchell is entitled to qualified immunity and will **DISMISS** Plaintiffs' § 1983 claim against Mitchell in his individual capacity.

2. R.D. Jamerson

Plaintiffs allege Jamerson was deliberately indifferent to Lanthorn's medical needs because he was aware Mitchell had transported Lanthorn to Lakeshore due to suicidal concerns; did not personally evaluate Lanthorn, discuss Lanthorn with Robertson, review Lanthorn's booking card, or ask the facility nurse to examine Lanthorn; yet instructed Mitchell to place Lanthorn in B-4 if at all possible. (Plaintiffs' Response, pp. 42-45). As the Court has already noted with respect to Mitchell, however, these facts alone do not amount to deliberate indifference. Plaintiffs do not allege Lanthorn told Jamerson he was suicidal or asked for medical care in Jamerson's presence.

However, Plaintiffs add a twist to the analysis of these facts by arguing Jamerson is independently liable as a supervisor because he sent Mitchell to assess Lanthorn without giving him proper direction or supervision. (Plaintiffs' Response, Court File No. 124, p. 43). Plaintiffs rely on *Greason v. Kemp,* 891 F.2d 829 (11th Cir. 1990). In *Greason,* the Eleventh Circuit held: "[A] supervisor can be held liable under section 1983 when a reasonable person in the supervisor's position would have known that his conduct

infringed the constitutional rights of the plaintiff and his conduct was causally related to the constitutional violation committed by his subordinate." *Id.* at 836. Because the Court has already determined Mitchell, Jamerson's subordinate, did not commit a constitutional violation, Plaintiffs' supervisor liability theory necessarily fails.

The analysis of Plaintiffs' claim against Jamerson does not end here, however. Plaintiffs' final argument concerning Jamerson presents the strongest evidence of deliberate indifference. Plaintiffs contend Jamerson watched Lanthorn tie the noose at 1:45 p.m., but did not alert other jail personnel until 1:55 p.m.

As evidence Jamerson saw Lanthorn tie the noose at 1:45, Plaintiffs rely on the following statement Sheriff Ron England made to the press:

> Our sergeant Jamerson was watching the monitors and seen him when he tried to place the loop on the bars and summonsed an upstairs jailer – they went in and one inmate helped hold him up and the jailers and the inmates took the noose from around his neck.

(Exh. D, Court File No. 124). In another statement, England indicated:

> [Lanthorn] was a Johnson City police department prisoner and . . . they transported him down here at 11:00 a.m. . . . [H]e was booked in, placed in a cell with four other inmates, and like I said at 1:45 while watching

> the monitor, sergeant Jamerson seen him put the sheet around his neck which was fashioned as a rope.

(*Id.*).

Jamerson contends this evidence is inadmissible because it is hearsay and therefore should not be considered in the summary judgment context. Jamerson also asserts lengthy discovery has produced no proof England's statements were accurate, "but has been consistent with the conclusion that he simply misspoke or misunderstood information relayed to him by someone else." (Reply, Court File No. 144, p. 6).

Plaintiffs argue England's statements are not hearsay and are admissible under *Fed. R. Evid.* 801(d)(2)(B) and (D) as an adopted admission or a statement by an agent. (Plaintiffs' Supplemental Response, Court File No. 157, p. 3). According to Plaintiffs, "admissions may be adopted by silence in circumstances where a person would ordinarily object to the declaration." *(Id.* at 4). Jamerson argues he was not present when England made the statements and therefore could not have adopted the statements through silence. (Supplemental Reply, Court File No. 162, p. 3). Jamerson also argues Plaintiff offers no evidence or substantive argument concerning the assertion England was Jamerson's agent.

Alternatively, Plaintiffs argue if England's statements are hearsay, they are nevertheless admissible under *Fed. R. Evid.* 803(24), the residual exception to the hearsay rule. Jamerson points the Court to the Advisory Committee note to Rule 803(24), which states: "It is intended that the residual

hearsay exceptions will be used very rarely, and only in exceptional circumstances." Jamerson contends Plaintiffs have failed to show this is an exceptional circumstance.

Finally, Plaintiffs argue England's statements are admissible under *Fed. R. Evid.* 804(a)(3) and 804(b)(5) because "Jamerson claims that he cannot recall whether he met with Sheriff England immediately following the hanging." (Plaintiffs' Supplemental Response, Court File No. 157, p. 5). Plaintiffs essentially contend Jamerson is an unavailable witness under Rule 804(a)(3) ("testifies to a lack of memory of the subject matter of the declarant's statement") and, therefore, England's statements are admissible under Rule 804(b)(5), the residual exception to the hearsay rule. Rule 804(b)(5), however, excepts statements from the hearsay rule "if *the declarant* is unavailable as a witness." (emphasis added). The Court notes Plaintiffs do not contend England, the declarant, is unavailable as a witness.

Although Plaintiffs' asserted rationales for admitting this evidence are of questionable merit, the Court is not convinced England's statements are inadmissible. Consequently, the Court will accord England's statement proper weight in considering Jamerson's summary judgment motion.

Plaintiffs also assert jailers Castle, Robertson, and Adams testified they were not notified of the problem in B-4 until 1:55 p.m. (Court File No. 124, p. 41) (citing Castle Depo., pp. 62-63; Robertson Depo., p. 119; Adams Depo., pp. 40-42). The Court notes the cited pages of Castle's and Robertson's depositions are not attached to Plaintiffs' pleading. The record does contain the cited pages of Adams's

deposition, however. Viewing the evidence in the light most favorable to Plaintiffs, Adams's testimony indicates Jamerson did not call a medical emergency until 1:55 p.m.

Accordingly, the Court finds Plaintiffs have introduced some evidence that Jamerson saw Lanthorn initiate the hanging at 1:45, but did not make other officers aware of the situation until 1:55. Because this evidence is sufficient to demonstrate deliberate indifference to Lanthorn's serious need for immediate medical care, the Court will **DENY** Jamerson's motion for summary judgment regarding individual liability under § 1983.

3. Sam Garland

Plaintiffs argue Garland was deliberately indifferent to Lanthorn's serious medical and psychological needs because Garland described Lanthorn as "not all there" and upset; witnessed Lanthorn kicking uncontrollably, "flopping his body about in a wild manner," and foaming at the mouth; heard Lanthorn screaming he was having a seizure and asking to go to the hospital; was instructed to contact Lanthorn's physician by the Rescue Squad, but failed to do so; signed the Rescue Squad form refusing transport to the hospital; failed to review Lanthorn's booking card; and failed to contact the Washington County Jail or pass along any information regarding Lanthorn's medical needs. (Plaintiffs' Response, Court File No. 124, pp. 61-63, 64-65; Plaintiffs' Supplemental Response, Court File No. 155, pp. 1-2).

Plaintiffs do not dispute that Garland called the Rescue Squad after he observed Lanthorn kicking uncontrollably, flopping about, foaming at the mouth, screaming he was

having a seizure, and asking to go to the hospital. This action certainly does not demonstrate deliberate indifference.

Although Plaintiffs assert Garland failed to contact the Washington County jail or pass along information about Lanthorn's condition, they have produced no evidence that Garland had a duty to transmit information to Washington County. Rather, Plaintiffs argue Johnson City had a policy of transmitting information along with a detainee. (Plaintiffs' Supplemental Response, Court File No. 155, p. 4).

Plaintiffs focus on Garland's signature refusing transport to the hospital. However, Plaintiffs have failed to introduce evidence that the Rescue Squad determined Lanthorn needed to go to the hospital. Moreover, Doug Green, an emergency medical technician, testified he offered to take Lanthorn to the hospital but Lanthorn refused transport. (Green Depo., Court File No. 124, pp. 52-54).

Next, Plaintiffs contend Green told Garland to contact Lanthorn's physician but Garland failed to do so. Green testified he told Garland to contact Lanthorn's physician to determine whether Lanthorn "needed his medications to keep his therapeutic levels up." *(Id.* at 51-52). Garland points out, however, Dr. Kenneth Emil Ferslew testified "Lanthorn had therapeutic levels of both desipramine and Valium in his system at the time of his death." (Ferslew Depo., Court File No. 107, p. 57). Garland also contends this medication had similar therapeutic benefits to the medication Lanthorn claimed he was taking. (Court File No. 145, p. 2). Plaintiffs do not dispute the level of medication in Lanthorn's system or the therapeutic benefits of that medication.

Garland also points out Dr. Fenley, the physician listed on Lanthorn's Johnson City intake form (Court File No. 94, Exh. B), testified he had talked with Lanthorn several days before the arrest, determined Lanthorn was seeking drugs, and advised Lanthorn he would no longer treat him. (Fenley Depo., Court File No. 161, pp. 100-102 & Exh. B). Plaintiff has offered no evidence controverting these assertions.

From this evidence, the Court finds even though Garland failed to call Dr. Fenley in accord with Green's instruction, this omission did not rise to the level of deliberate indifference. Lanthorn did not exhibit to Garland such a strong likelihood that he would attempt to take his own life that failure to take adequate precautions amounted to deliberate indifference to Lanthorn's serious medical needs.

Moreover, Garland's failure to call Dr. Fenley or transmit information to Washington County regarding Lanthorn's condition was not the proximate cause of Lanthorn's death. *See Horn v. Madision County,* 22 F.3d 653, 659 (6th Cir. 1994) ("[P]roximate causation is an essential element of a § 1983 claim for damages."). Plaintiffs speculate if Garland had allowed Lanthorn to be transported to the hospital and examined, a physician would have discovered Lanthorn "was toxic on the psychotropic drug Imipramine," Lanthorn "would have received treatment necessary for his well-being," and he would not have been transported to Washington County. (Plaintiffs' Response, Court File No. 124, p. 53). The Court finds Plaintiffs have produced no evidence directly relating Garland's failure to call Dr. Fenley to Lanthorn's death. The obvious fact is

Lanthorn did not die or suffer life threatening injuries in the Johnson City Jail.

Plaintiffs argue "the absence of information from Johnson City, when the custom was to provide such information, diminished the likelihood that adequate medical care would be provided in Washington County." Diminishing the likelihood of adequate medical care simply is not equivalent to proximately causing death. Because Plaintiffs have not shown Garland was deliberately indifferent to Lanthorn's need for medical care or that Garland proximately caused Lanthorn's death, the Court will **DISMISS** Plaintiffs' § 1983 claim against Garland as it relates to denial of adequate medical care.

Although the Court has already concluded Garland cannot be held personally liable for Lanthorn's death, Plaintiffs' excessive force claim requires further discussion. Plaintiffs rely on the following evidence in support of their excessive force claim:

1. The videotape taken at the Johnson City jail indicates that Sam Garland was the only jailer who entered Craig Lanthorn's cell out of sight of the cameras.

2. Three hundred and eighty pound Garland admitted that he used some force (his foot) against Craig Lanthorn.

3. Dr. Blake testified that the bruise on Craig Lanthorn's buttocks was

consistent with a footprint or stomp injury and the bruise above the knee cap was consistent with a foot being placed on the knee area.

4. Other bruises identified in the autopsy appear to have been inflicted in forty-two (42) hours plus or minus six (6) to eight (8) hours from autopsy.

5. Although minor bruises appear to have predated Craig Lanthorn's entry into the Johnson City facility, the bruises in question appear to have occurred twenty-four (24) to forty-two (42) hours prior to hanging – the time period during which Mr. Lanthorn was in Johnson City custody.

6. Lanthorn identified Garland as his abuser to Tom and Roma Cowan, his aunt and uncle, and jailer William Crumley.

(Plaintiffs' Supplemental Response, Court File No. 155, pp. 5-6) (citations omitted).

Initially, the Court notes the videotape referenced in item one has not been submitted to the Court, nor has testimony regarding the contents of the video. Second, the Court notes the videotape alone could not show Garland was the only jailer who entered the cell out of view of the camera. Such a conclusion would require evidence of the time period

during which the videotape was recorded, the time period Garland was in Lanthorn's cell, and some further proof that no other jailer entered Lanthorn's cell during the time the videotape was recorded. In short, Plaintiffs' summary reference to the videotape is insufficient to identify Garland as the assailant.

Garland argues Dr. Blake's opinion as to the age of the bruises does not prove Garland inflicted the bruises. According to Garland, Dr. Blake began the autopsy at approximately 2:30 p.m. on August 4, and Garland was in Lanthorn's cell at approximately 2:00 p.m. on August 2. (Garland's Supplemental Reply, Court File No. 171, p. 2). Garland correctly notes Dr. Blake testified the bruises occurred 24 to 42 hours prior to the autopsy, not prior to the hanging as Plaintiffs suggest. (Blake Depo., Court File No. 171, pp. 108-109). Garland argues Lanthorn was in the Washington County jail 24 hours before the autopsy and at 42 hours prior to the autopsy Lanthorn was in the Johnson City jail, but Garland had already left for the day. (Garland's Supplemental Reply, Court File No. 171, p. 2).

Plaintiffs do not establish when the autopsy took place. However, the Court notes Dr. Blake's report states the autopsy was performed "in the early am hours" of August 4, 1994 after Lanthorn died at approximately 5 a.m. (Blake Depo., Court File No. 145, Exh. 208). Assuming the autopsy was performed at 5 a.m. on August 4, 1994, Dr. Blake's testimony at best establishes Lanthorn incurred bruises between 11 a.m. on August 2 and 5 a.m. on August 3. Thus, viewed in the light most favorable to Plaintiffs, Dr. Blake's testimony merely establishes Lanthorn's bruises might have been incurred while he was in the Johnson City jail. It does

not establish the more critical fact: that Garland is the jailer who bruised Lanthorn.

Plaintiffs' only evidence identifying Garland as the assailant consists of statements Lanthorn made to Tom Cowan, Roma Cowan, and William Crumley. Garland argues these statements are inadmissible hearsay. Plaintiffs argue the statements are admissible under *Fed. R. Evid.* 804(b)(5), which provides in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> **(5) Other exceptions**. A statement not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Garland argues Rule 804(b)(5) does not apply because the statements do not have equivalent guarantees of trustworthiness. Plaintiffs contend the statements have equivalent guarantees of trustworthiness because they "will come in through Tom and Roma Cowan, both attorneys admitted to practice in this Court, and of unquestionable credibility." (Plaintiffs' Supplemental Response, Court File

No. 155, p. 6). Plaintiffs also contend the statements are corroborated by the testimony of William Crumley and Dr. Blake. (*Id.*).

Although the Court certainly does not doubt the credibility of Tom and Roma Cowan, their credibility is not the issue. Rather, the issue is whether the statement of Lanthorn to Tom and Roma Cowan has equivalent guarantees of trustworthiness. The Court finds the statement does not have such guarantees and is therefore inadmissible hearsay.

Roma Cowan testified Lanthorn appeared to be "under the influence" while he was in jail. (Court File No. 107, R. Cowan Depo., p. 25, 36-37). Tom Cowan testified Lanthorn said he had been beaten by "a big, bad man" in a "dark blue shirt." (Court File No. 107, T. Cowan Depo., p. 14). According to Tom Cowan, he took Lanthorn out to jailer Bill Crumley and asked if Crumley was the assailant. Lanthorn said, "No he was a much bigger person." *(Id.)*. Crumley then described Garland, and Lanthorn said, "Yeah, that's him." *(Id.* at 15).[5] Crumley also testified Lanthorn stated the person who beat him was wearing a dark blue shirt and that jailers, including Garland, wore white shirts. (Crumley Depo., Court File No. 124, pp. 51-53). The Court finds Lanthorn's statements do not have equivalent guarantees of trustworthiness and therefore are not admissible pursuant to Rule 804(b)(5).

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[5] The Court notes Roma Cowan's description of these events is substantially similar to Tom Cowan's description. *(See* R. Cowan Depo., Court File No. 124, pp. 19-22).

Because Plaintiffs' have insufficient evidence linking Garland to the bruises found on Lanthorn, the Court finds Garland is entitled to summary judgment on Plaintiffs' excessive force claim. *Cf. Doe v. Sullivan County,* 956 F.2d 545, 550 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 187 (1992) (recognizing proving causality is difficult but nevertheless requiring plaintiff to produce more than "naked assertion" that assault would not have occurred but for alleged overcrowding).

B. Municipal Liability

The doctrine of respondeat superior does not apply to municipalities. *Oklahoma v. Brown,* 117 S. Ct. 1382, 1388 (1997). "[A] plaintiff seeking to impose liability on a municipality under § 1983 [must] identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Id.* "The plaintiff must . . . demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Id.* In other words, the plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.*

Plaintiffs argue Washington County had policies of deliberate indifference to serious medical needs and to safe confinement. In connection with these policies, Plaintiffs assert three basic arguments.

First, Plaintiffs contend Sheriff England ratified Jamerson's actions by failing to investigate or discipline him and thus adopted a policy of deliberate indifference to serious medical needs which subjects Washington County to liability.

In support of this argument, Plaintiffs cite *Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1247-48 (6th Cir. 1989) and *Marchese v. Lucas,* 758 F.2d 181, 188 (6th Cir. 1985). Having carefully reviewed *Leach* and *Marchese,* the Court finds those cases do not support a finding of municipal liability in this case. Plaintiffs have failed to show how England's alleged ratification of Jamerson's acts caused or contributed to the alleged deprivation of Lanthorn's constitutional rights. *See Brown,* 117 S. Ct. at 1388 (requiring plaintiff to show direct causal link); *Marchese, 758* F.2d at 189 (finding injuries *resulted* from official policy of sheriff).

Second, Plaintiffs argue Washington County has exhibited deliberate indifference to serious medical needs by failing to train its officers to assess Lanthorn's suicide risk and take reasonable steps to protect him. (Court File No. 124, p. 36). The United States Supreme Court has held inadequate training can be the basis for § 1983 liability under certain conditions:

> in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers'

> choice – namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation – that the municipality's indifference led directly to the very consequence that was so predictable.

Brown, 117 S. Ct. at 1391.

Plaintiffs contend the officers in this case, like the officers in *Russo v. City of Cincinati,* 953 F.2d 1036, 1046 (6th Cir. 1992), have admitted they frequently deal with "mentally and emotionally disturbed and disabled individuals" but were unable to specifically describe the content of their training. Plaintiffs assert "Washington County had sufficient information that, if properly trained, would have alerted its personnel to Craig Lanthorn's suicide risk and their duty to take reasonable steps to protect him." As previously discussed in connection with individual liability, however, the Court has already determined Lanthorn did not exhibit such a strong likelihood of suicide that he was constitutionally entitled to suicide screening and prevention.

Washington County cites *Barber v. City of Salem,* 953 F.2d 232 (6th Cir. 1992). In *Barber,* the Sixth Circuit found the decedent had not exhibited a strong likelihood he would commit suicide; therefore, the failure to take special precautions did not amount to a constitutional violation of deliberate indifference to serious medical needs. With respect to municipal liability, the Court concluded: "[W]here no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and

to better train personnel to detect and deter jail suicides." *Id.* at 240.

Plaintiffs argue Washington County's reliance on *Barber* is misplaced because the law has changed since the suicide in *Barber*. According to Plaintiffs, the suicide in this case took place nine years "after the Sixth Circuit recognized the potential liability resulting from a failure to properly take precautions in a suicide situation" – apparently in the *Danese* decision which was rendered in 1985 – and after *Horn v. Madison County,* 22 F.3d 653 (6th Cir. 1994), *Roberts v. City of Troy,* 773 F.2d 720 (6th Cir. 1985), and *City of Canton v. Harris,* 109 S. Ct. 1197 (1989).

The Court notes, however, the latest Sixth Circuit case cited by Plaintiffs, *Horn v. Madison County,* did not change the law established by *Danese,* but instead cited and reiterated the essential holding of *Danese* by stating: "Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." *Horn,* 22 F.3d at 660.

Plaintiffs further argue:

> [I]n *Barber,* there was no evidence that the decedent had requested to see a doctor, there was no doctor at the scene informing the arresting officer that the decedent was delusional, and needed medical care, there was no disclosed history of panic attacks, psychotropic medications, or seizures, and there was no evidence such as the extensive evidence of abnormal behavior or a known

> recent commitment to a mental institution for suicidal concerns.

(Court File No. 158, p. 2).

Initially, the Court notes Plaintiffs have not pointed the Court to evidence indicating Lanthorn asked a Washington County employee to see a physician. (*See* Court File No. 158; Court File No. 124, pp. 20-37). With respect to the remaining facts asserted by Plaintiffs, the Court has already determined those facts do not exhibit a strong likelihood of suicide and therefore do not give rise to a constitutional violation.

Third, Plaintiffs assert Washington County was deliberately indifferent to safe conditions of confinement because three suicides had occurred in cell B-4, yet Washington County never removed the horizontal bars from that cell. This argument requires careful attention to the particular right Plaintiffs assert. Plaintiffs' real argument is that Lanthorn should not have been placed in B-4 because he was suicidal. Thus, in essence, Plaintiffs are reasserting Lanthorn's right to be screened for suicidal tendencies. Again, the Court has already determined Lanthorn did not exhibit a strong likelihood of suicide; therefore, the decision to place Lanthorn in B-4 was not a product of a municipal policy of deliberate indifference to safe conditions of confinement, in short, the Court finds Washington County is entitled to summary judgment on Plaintiffs' § 1983 claim because Plaintiffs have failed to show that a policy or custom of Washington County was the "moving force" behind deprivation of Lanthorn's constitutional rights.

The Court also finds Johnson City is entitled to summary judgment with respect to Plaintiffs' § 1983 claim. Plaintiffs assert Johnson City had a policy or custom of deliberate indifference to serious medical needs because it failed to properly train its officers. As the Court concluded with respect to Washington County, however, Plaintiffs have not shown an underlying constitutional violation giving rise to a duty to train.

In addition, the Court finds Plaintiffs have failed to demonstrate an action by Johnson City directly resulted in deprivation of Lanthorn's rights. *See Brown*, 117 S. Ct. at 1388. Plaintiffs argue "[t]he Johnson City officers' failure to provide adequate medical care for Craig Lanthorn, as well as their failure to pass along information to the Washington County jail officials regarding Craig's medical needs, constitute deliberate indifference to those needs and also establish proximate cause of Craig Lanthorn's later demise." (Court File No. 124, pp. 53-54). Plaintiffs do not offer any authority indicating Johnson City had a duty to pass information on to Washington County. Thus, Plaintiffs' argument devolves to: "[I]f adequate medical care had been rendered, Mr. Lanthorn would not have been in the position to commit suicide." (Court File No. 152, p. 6). This argument is insufficient to prove Johnson City proximately caused a deprivation of Lanthorn's constitutional rights. *See Horn v. Madision County,* 22 F.3d 653, 659 (6th Cir. 1994) ("[P]roximate causation is an essential element of a § 1983 claim for damages.").

V. CONCLUSION

The Court finds Defendants Mitchell and Garland are entitled to qualified immunity with respect to Plaintiffs' § 1983 claims based on the right to adequate medical care, and Garland is entitled to summary judgment with respect to Plaintiffs' excessive force claim. In addition, the Court finds Defendants Washington County and Johnson City are entitled to summary judgment on Plaintiffs' § 1983 claims. Remaining for adjudication are Plaintiffs' state law claims, on which the Court has reserved ruling, and Plaintiffs' § 1983 claim against Defendant Jamerson in his individual capacity.

An appropriate order shall enter.

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at GREENEVILLE

[Filed September 18, 1997]

No. 2:95-CV-325

NANCY L. ELLIS, individually and as next friend of CATHERINE E. LANTHORN,
Plaintiffs,

v.

WASHINGTON COUNTY, TENNESSEE; SHERIFF FRED PHILLIPS, in his official capacity; R.D. JAMERSON, individually and in his official capacity; BILLY MITCHELL, individually and in his official capacity;

JOHNSON CITY, TENNESSEE; CHIEF OF POLICE RON STREET, in his official capacity; and SAM GARLAND, individually and in his official capacity,
Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum, the summary judgment motions of Defendants Washington County (Court File No. 102); Johnson City (Court File No. 93); Garland (Court File No. 106); and Mitchell (Court File No. 96) are **GRANTED** to the extent they seek dismissal of Plaintiffs' § 1983 claims. Because the Court finds Defendant Jamerson is not entitled to qualified immunity, his summary judgment motion (Court File No. 98) is **DENIED** with respect to Plaintiffs' § 1983 claim. The Court reserves ruling on the portions of Defendants' motions dealing with Plaintiffs' state law claims.

In view of the proximity of this decision to the September 22, 1997 trial date, the Court hereby **CANCELS** the current trial date and **RESETS** this case for trial on **January 27, 1998**.

SO ORDERED.

ENTER:

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

Deposition Excerpts of Dr. Cleland Blake

* * *

[Page 36]

. . . minutes of deprival, five to six minutes of oxygen deprival, you've got a brain that's in bad trouble and probably cannot be salvaged.

Q. Okay. So if there had been. . .

A. That guy has twelve or more minutes.

Q. All right. So if we apply that question to this case, when would this young man had been salvageable if he could have been removed from the noose anytime within five to six minutes from the time. . .

A. Five to six minutes is already risky.

Q. Okay.

A. If you get him down at two or three or four minutes, you've got a chance. At two minutes you've got a good chance.

Q. But at five or six minutes irreversible or irreparable injury. . .

A. Is probable.

Q . . . in your opinion based upon a reasonable degree of medical certainty. . .

A. Is probable.

Q. . . .has occurred to the brain?

* * *

[Page 127]

. . . one half hours with no oxygen to my heart.

Q. Now your report that you sent to Ms. Sobieski's office indicates that in your last paragraph you made the statement that "death resulted from the apparent suicidal suspension at the jail the same having persisted for a time of more than 5 minutes and more likely no longer than 15 to 20 minutes reflected in the various examinations and records of the hospital," and you base that on the dilated and fixed pupils. Is that correct?

A. That's part of it.

Q. "But yet, with the ability of the heart and lungs to be resuscitated." From what source or sources did you obtain information that the heart and lungs were able to be resuscitated?

A. Resuscitated and maintained. The fact that they kept him on the life support systems.

Excerpt from Deposition of Dr. Cleland Blake

Q. Okay.

A. If the heart had not had the heart either not been still beating or capable of beating the heart can still be capable of beating for five minutes on its own after the brain has reached a level of hypoxia to make you brain . . .

APPENDIX E

Deposition Excerpts of Sue Forte

* * *

[Pages 47- 48]

Q. Which jailer told you that was the time that they first called for you?

A. I don't recall. I really don't.

Q. Okay. All right. Do you know when they told you it was 1:55?

A. No.

Q. All right. Sorry for the interruption.

A. That's okay.

Q. Let's go back. At what point did you get some response from Mr. Lanthorn?

A. Well, after the medics at that point, the medics had taken over, and I mean they worked and worked and worked and worked and were getting nothing, absolutely nothing, and they were getting ready to call it. That's what we call it, call the code after you work diligently, and he'd had, you know, medications and all that, and I mean like a last ditch effort they were just really trying to save this kid,

and they had a monitor hooked up to him, and he just I mean it was flat, and then just suddenly there was a beat.

Q. You're talking about a heart monitor.

A. A rhythm. Yes.

Q. So it picked up a rhythm?

A. Yes, Ma'am. And everybody was like shouting. They were so happy after they'd worked so hard trying to save him.

Q. Okay. Have you had in your professional experience any other experiences working with someone who has been suspended like that, hung, or was this the first hanging that you had involvement with?

A. The first hanging. I've worked a lot of cardiac arrests but no hanging.

Q. Okay. I haven't worked any, but you said cyanotic. So tell me what that means to you.

A. Bluish grayish color.

Q. And does that tell you anything about how long he had some sort of interruption of heartbeat or breathing or whatever it is that produces cyanotic. . .

Well, medically, they say, you know, three, four minutes without any oxygen to the brain, you know, but someone can turn blue in just a matter of seconds. I have no idea how long . . .

* * *

APPENDIX F

Deposition Excerpts of Michael Jenkins

* * *

[Pages 121 - 124]

A. I would hope that they would be placed in a cell which had a fewer number of inmates, not a dormitory but a fewer number of inmates. I don't think this individual could be put in a 32 person pod to be handled, but this person should probably be assigned to, you know, a four or eight or sixteen max.

Q. What about observation routine frequently?

A. Well, probably I'm bothered when they put me in an elevator.

Q. Uh huh.

A. But I know the door is going to open up, and I'm going to get out. Anxiety and panic, you know, that to me is not as much as an act of violence upon oneself or an act of violence upon someone else.

Q. Absolutely, but it's a red flag that might need to consider special handling?

Excerpt from Deposition of Michael Jenkins

A. Well, it's something that you consider. I mean, you know, in the training what I try to tell the people, you know, if they come in and they're crying and they're embarrassed and, you know, "I feel like hurting myself," you know, we've run up three flags. It's time to look at this, but, you know, I can come in and be crying and not have any of the other facts and just go to general population.

Q. How many flags does it take?

A. Well, it takes two or three. You know, you can't we all suffer from, you know, certain things. You put me in jail, I'm going to be embarrassed. That don't mean I'm going to hurt myself.

Q. When you do your training, do you teach a profile of an inmate more likely to commit suicide?

A. Yes, we do.

Q. And what is that profile?

A. Most of the time it's a young, white male who is probably is either drunk or drinking, who's had a domestic he's having problems in his life whether it be with a wife or a girl friend or whether he is a professional who has been arrested and is going to be embarrassed, you know, the pastor of First Baptist Church, for example.

Q. It's more likely to happen the first time they've been arrested?

A. Yes.

Excerpt from Deposition of Michael Jenkins

Q. And that's something you regularly teach to the officers who. . .

A. That is also reinforced I think by even one of the little training films that we show. I think it's owned by Greene County, and I think we borrow it and show it continually. I can't think what the name of it is right off the top of my head. You'd think I'd know it.

Q. Another indicator would be a history of mental illness?

A. Always.

Q. Severe intoxication?

A. Severe intoxication should be medically treated. . .

Q. Always.

A. Yes.

Q. Okay. And we've already talked about crying, despondency, disorientation. All of those would be a red flag?

A. Uh huh. (Yes.)

Q. And severe anxiousness, anxiety, unable to settle down, those would all be red flags?

A. Yes.

Excerpt from Deposition of Michael Jenkins

Q. Okay. Now. . .

A. Severe anxiety and unable to settle down, that'd be also an indicator and would point toward some act of violence against an individual themselves. That would also be one of the things, male rape or rape of a female within the jail. Failure to sleep, lying in a fetal position, being in the corner mumbling or talking to oneself or having an unreal outlook on life.

Q. Do you still inspect the Washington County Jail?

A. Yes.

Q. Were you ever relieved of that responsibility temporarily?

A. Yes.

Q. When was that?

A. This was after we went to Federal Court and I think Ron and I had a discussion. I don't think I was officially ever relieved. I just had assistance in inspecting the jail.

Q. And what assistance did you have inspecting the jail?

A. The Director of Inspections accompanied me or an inspector from Nashville came and accompanied me.

* * *

APPENDIX G

Deposition Excerpt of Ron Street

* * *

[Page 52]

A. Or claim to.

Q. Okay. And do you have – since you've been associated with the Johnson City Police Department, have there been incidents of suicide attempts in the Johnson City Jail?

A. Yes, Ma'am.

Q. Okay. And have some of those been successful?

A. One that I'm aware of.

Q. And when was that one?

A. 1982.

Q. Okay. Do you recall the circumstances of that successful suicide?

A. Yes, Ma'am.

Q. Would you tell me, please?

A. His name was Dean Francis. He was placed in a watch cell. He had been down to a court appearance. This has been a long time ago. So I'm going to tell you what I remember. Came back, and it was a situation as I recall it that his family would not get him out of jail. He took his socks off and put a loop around his neck and squatted down and hung himself.

Q. Okay. Do you know what he suspended from? Do you recall?

* * *

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ERRATA SHEET

STYLE OF CASE: ELLIS, ET ALVS WASHINGTON COUNTY, ET AL

DEPOSITION OF: RON STREET

PAGE NO.	LINE	CORRECTION
52	2	Q. Okay, And do you have -- since you've been associated with the Johnson City Police Department, have there been incidents of suicide attempts in the Johnson City Jail?
	6	A. Yes, Ma'am.
	7	Q. Okay, and have some of those been successful.
	9	A. One that I'm aware of.
		My correct response would be two suicides have occurred. The second death occurred on 1/1/93, at approximately 3:50AM, the viccim was William C. McDuffie.

SIGNATURE: Ron Street

STATE OF:
COUNTY OF:

SWORN TO AND SUBSCRIBED BEFORE ME THIS 5th OF Sept, 1997.

Barbara J. Brown
NOTARY PUBLIC

Comm.Expires: 7/26/99

001431

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APPENDIX H

Deposition Excerpts of Dr. Nancy Lanthorn Ellis

* * *

[Page 126]

. . . turned out differently? Of course, I feel guilty back to birth if there's anything that I could have done to prevent this. As far as the time of the jailing and what was going on there, I honestly was doing what I thought was the best thing to do for Craig and what I have always advised parents to do in therapy, and that is leave them in jail long enough to let them suffer the consequences so they can learn a lesson. Now I would never ever do that again because at that time, I thought jail would be a safe place to let children learn a lesson and so maybe they wouldn't be there again. So even though it turned out the way it did, I honestly did what I thought was the best thing for my son's well being. I thought it was the right thing to do.

Q. Have you expressed any belief to Dr. Hogen that Hagen that Craig has some responsibility or blame for his own death?

A. No, I don't think I've expressed that to Dr. Hagen.

Q. Do you believe that to be true?

A. I believe that we're responsible for the choices that we make, and I believe that some of our choices have long term...

* * *

[Pages193-194]

A. That's correct.

Q. And did you speak to any jailers at that time?

A. No.

Q. Were there any jailers on the line?

A. No.

Q. None whatsoever? You heard no jailer voices?

A. Yes. I heard the jailer's voice. She was obviously standing right next to Craig. I could hear her clearly.

Q. Did you ask to speak to a jailer?

A. All the jailer was saying was, "Craig, tell her you have to get off. Craig, tell her you have to get off." She said that over and over while he's trying to say, "I'll go to the hospital," and I'm trying to say, "I'll get your dad." We've got three minutes to do this, and all I hear her say is, "Craig, get off the telephone."

Excerpts from Deposition of Dr. Nancy Longthorn Ellis

Q. Now based upon your telephone conversation with Criag while in the Jonesborough Jail and your knowledge of his psychiatric history at the time of that conversation, you did not believe Craig was suicidal. Is that correct?

A. At the time of that conversation when he broke down and said, "Mama, this is your baby. Come and get me," that really got my attention. I was extremely glad that that jailer was standing right there and heard everything that he said and saw how upset he got because I was sure then that he would be safe because she knew how upset he was.

Q. Do you know which jailer it was?

A. I assume it was Wanda Robertson. She's the only one I've known of that was female that was there that day.

Q. But in answer to my question, you did not believe him to be suicidal?

A. I did not think about whether he was suicidal. I just thought about getting him out of there, get him in the hospital, you know, hoping he wasn't suffering too much.

Q. Did you think he needed to be placed in a suicidal watch cell?

A. At that point in time, I'm sure that he did need to, but that's based on a lot of information that I've gotten since then. At . . .

* * *

Excerpts from Deposition of Dr. Nancy Longthorn Ellis

[Pages 200 - 201]

. . .would go to the hospital, that I would come and get him and put him in the hospital.

Q. Now as far as Billy Mitchell is concerned in his I take it in his assessment of your son in terms of suicide risk, how was he deliberately indifferent?

MS. SOBIESKI: Object to the extent that calls for a legal conclusion.

Q. If you can tell me.

A. I'm not able to see through any of the information that's been available to me that Mr. Mitchell really considered anything except asking Craig, "Are you suicidal?" and Craig saying no. I'm not under the impression that he used any of the information that he had available to him.

Q. I'm trying not to be argumentative, but isn't that the same method you determined when you talk to Craig . . .

A. I wasn't. . .

Q. . . .when he was in Johnson City as to whether he was suicidal or not?

A. I wasn't doing a suicidal assessment. I wasn't evaluating him for suicide. I was his mother, very upset, practically in shock, trying to figure out what to do and

thinking he was safe and thinking other people were doing their jobs and that he would be watched.

Q. Why would one ask the question, "Are you thinking of suicide?" if not to do a suicide assessment, whether as a mother, psychologist, jailer, whatever?

A. Because if you get the answer, "Yes, I am," then you take immediate action to do something about that. If you get the answer, "No, I'm not," that's just one small piece of information. That's certainly not how we do a suicidal evaluation.

Q. Who is "we"?

A. Psychologists, psychiatrists, people who are trained to do that.

Q. And you're not holding Billy Mitchell to that standard?

A. No, I'm not holding him to that standard at all.

Q. What should or what do you believe Billy Mitchell should have done and how would he have known to do that?

A. He knew Craig had been raped. He knew he had been involuntarily committed for suicidal, not risk, because he was thought to be . . .

* * *

APPENDIX I

WASHINGTON COUNTY JAIL MANUAL

V. Use of Force During Emergency Situations

A. Only the amount of force necessary to maintain control shall be used.

B. Once restrained, an inmate shall not be struck or abused.

C. Corporal punishment shall not be used under any circumstances.

D. Reasonable force may be used to overcome resistance, repel aggression, protect life, or retake prisoner or property.

E. All use of force shall be thoroughly documented with a detailed account of the persons involved, the force that was used and the justification for its use.

VI. Potential Suicide

A. If an officer observes an inmate exhibiting signs of emotional instability or psychological distress, the inmate shall be observed every 15 minutes, and the mental health center shall be notified by telephone.

B. The mental health center will determine the appropriate medical action to be taken and the Superintendent will determine what security precautions must be followed.

C. Any inmate who is under observation due to suicidal tendencies shall have the following items removed from his cell:

1. Anything with which he could hang himself – belts, shoe laces, sheets, towels, etc.

2. Matches and flammable materials.

3. All sharp objects.

D. Officers routinely shall observe all inmates, especially those newly admitted or just sentenced, for abnormal behavior indicative of potential suicide:

1. Depression.

2. Insomnia.

3. Withdrawal from others.

4. Apathy and despondency.

5. Slow walking.

6. Slumped sitting.

7. Frequent crying.

8. Fatigue.

9. Weight loss.

10. Loss of appetite.

11. Talk of suicide.

12. Agitation.

13. Overt psychosis.

All officers shall inform the ranking officer on duty and the relief officer of any such observations. If it is determined that an inmate may be suicidal, the inmate shall be placed in an area where constant observation can be provided and communication encouraged.

APPENDIX J

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS GENERALLY
42 U.S.C.S. 1983 (1999)

1983. Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
MAR 29 2000
CLERK

(2)

No. 99-1420

IN THE

Supreme Court of the United States

NANCY LANTHORN ELLIS, *et al.*,

Petitioners,

v.

WASHINGTON COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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United States Supreme Court Rule 14 ..... 26, 27, 30

STATEMENT OF THE CASE

This case is fact intensive. In the interest of brevity, the respondents submit the following outline of significant circumstances and events:[1]

August 2, 1994

- At 12:04 p.m., Johnson City public safety officers responded to a 911 call initiated by a young woman reporting that a person was breaking into her home. [App. 100, 299, 341]

- At 12:35 p.m., following his arrest for public intoxication and criminal trespassing, Craig Lanthorn (deceased) was booked into the Johnson City Jail by Laura Bolton. [App. 103-104] When asked if he was in need of medical treatment, Lanthorn responded "No." [App. 103-104, 147]

- At 2:00 p.m., a kicking noise was heard in the vicinity of Lanthorn's cell and Jailer Sam Garland investigated the disturbance. [App. 254-255] Lanthorn told Garland he was having a seizure and wanted to go to the hospital. [App. 256, 258] In accord with protocol, Garland had Emergency Medical Services (EMS) summoned, and medical personnel Doug Green and Johnny Miller arrived within a matter of minutes. [App. 254–258, 269, 667] During the brief interim before EMS arrived, Garland returned to Lanthorn's cell, opened the door and was kicked by

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1. All references are to the Joint Appendix page number "[App. __]."

Lanthorn who was barefooted and lying on the floor. [App. 259] Wearing a black tennis shoe, Garland put his foot on Lanthorn's shin or ankle to prevent the kicking, applied very little force and told Lanthorn emergency aid was on the way. [App. 668-669]

- Lanthorn's medical examination at 2:05 p.m. resulted in a finding that he was not having a seizure. [App. 270, 276] Medical records reflect that Lanthorn was anxious, nervous, communicative and making sense; oriented to person, place and time; wanted medication; pulse regular, blood pressure normal, respiration regular and non-labored; pupils equal and reactive; skin dry, warm and normal in color. [App. 268, 271, 273-274, 284-286] EMT Green developed a rapport with Lanthorn during this medical examination and saw no evidence of suicidal tendencies in Lanthorn. [App. 288, 291] EMT Green testified that if he thought Lanthorn had needed a physician or that he was medically deteriorating he would have transported him to the hospital, involuntarily if necessary. [App. 291] Toward the end of Lanthorn's medical examination, he told EMT Green that he had been "kicked by the police" and identified his upper torso as being the location where he had been kicked or injured. [App. 275, 277-278] Green had Lanthorn remove his shirt and found no evidence of bruising or any signs of injury. [App. 275]

- EMT Green advised Jailers Garland and Bolton that Lanthorn was "okay to serve his time," and this was contemporaneously noted on the jail log. [App. 60, 66-67, 110, 260-261] EMT Green testified that Lanthorn told him he wanted his anxiety

medication. EMT Green says he told Jailer Garland "he might want to check with [Lanthorn's] doctor and see if he needs his medications." [App. 274, 280] Although this testimony must be assumed to be true for purposes of summary judgment, Jailer Garland denies this statement was made and consequently, no contact was made.

- EMT Green asked Jailer Garland to sign the EMS trip report on a line reflecting "refused transport." [App. 282] EMT Green testified that he was simply asking Jailer Garland to sign on behalf of Lanthorn reflecting Lanthorn's declining of EMT Green's offer to transport him to the hospital. [App. 282-283] EMT Green has testified that Jailer Garland did not in any way refuse or prevent Lanthorn from being transported. [App. 289]

- After approximately four (4) hours in the "drunk tank", Lanthorn was transferred to a regular cell block where he had unrestricted access to a telephone. He used this telephone extensively — calling his mother on at least four (4) occasions, his father, aunt, uncle, grandmother, mother's fiancé and family friends. [App. 152, 216, 239-240, 249, 252-253, 295, 298, 328-329]

- At approximately 7:00 p.m., during the evening shift, a local attorney and his wife (who is also an attorney and pro se prisoner law clerk working within the Northeast Division of Tennessee's Federal District Court) arrived at the City Jail seeking a visit with Lanthorn. [App. 180, 197] The jailer on duty initially thought this was an attorney/client visit, but he soon

learned that the attorneys were Lanthorn's aunt and uncle. [App. 196-197] Even though personal visitation is permitted only on scheduled days and times, the visitation was allowed. [App. 744]

- The aunt and uncle testified that during their visit with their nephew he was speaking slowly and deliberately, but he was sensible, rational and not anxious. [App. 166, 172] According to the aunt and uncle, Lanthorn was not apathetic, despondent or withdrawn, and there was no observation by them of his being compulsive, agitated, hostile or delusional. He did not have trouble communicating with his aunt or uncle, and to the extent of their abilities, they saw nothing leading them to think he might be suicidal. [App. 158-160, 163-166, 167-169, 172] They had no reservations about Lanthorn's emotional stability. [App. 171, 176, 178] Lanthorn did "tear up" but did not cry when his aunt hugged him and told him she loved him as she was leaving. [App. 161-162]

- During the evening shift (4:00 p.m. to midnight), Lanthorn talked by telephone to his mother, a practicing clinical psychologist, on at least four (4) occasions, speaking with her for a total of about forty (40) minutes. [App. 239-240] Lanthorn talked to his father, also a practicing clinical psychologist, on several occasions by telephone while in the City Jail. [App. 326-327] Dr. Lanthorn testified about his experience treating and assessing suicidal patients and candidly acknowledged that he did not develop concerns about suicide or self-harm during any of his conversations with his son. [App. 326-329, 330-334] Dr. Lanthorn is not a party to this litigation, it being brought only by Lanthorn's mother, Dr. Ellis.

- During one of Dr. Ellis's telephone conversations with her son and because of her knowledge of a past suicidal episode by him, she asked him if he was thinking about hurting himself. He replied, "No," and she was satisfied with that. [App. 237-238] Lanthorn also had five (5) separate telephone conversations with his grandmother. She did not detect any suicidal notions and described Lanthorn as articulate and rational even though his speech seemed slurred. [App. 295-296, 298]

August 3, 1994

- From midnight to 8:00 a.m., Lanthorn slept through the night without disturbance or difficulties. [App. 811]

- Even though Lanthorn's troubled past was well known to his parents and, in large measure, to other family members who had contact with Lanthorn while in the City Jail, no information about his medical or psychiatric history was provided to the City Jail staff. [App. 151, 169, 178, 218, 224, 226, 231, 234-235] Lanthorn's history included the use of hard drugs, cult participation, a rape never reported to police, a near death experience brought about by intravenous drug usage and an involuntary commitment to a psychiatric hospital about which he was very bitter. [App. 218, 220-221, 223, 225-231, 234-235, 240, 318-325, 335-338, 347, 873, 875-877] The physician listed on Lanthorn's jail intake form had actually terminated the doctor/patient relationship due to Lanthorn's excessive consumption of prescribed drugs and angry demands for more. [App. 103-104,

810, 832-840] Another psychiatrist who had treated Lanthorn for panic attacks and anxiety testified that Lanthorn would not be sleeping through the night in the City Jail if he were having such an episode, as the plaintiffs in this case originally claimed. [App. 505, 853-859, 863-865, 872]

- At approximately 8:30 a.m., Lanthorn was arraigned before Judge William Mooney. [App. 267] Following his arraignment, Lanthorn continued to use the telephone located in his cell. A family friend, whom Lanthorn called, described him as upset but rational. [App. 247] This family friend was familiar with Lanthorn's long-standing drug problems and past suicidal episode. When Lanthorn told her she was his "last chance," she developed a concern about him. This concern was relayed to Lanthorn's mother, Dr. Ellis, but no one contacted the jail to report any concern. [App. 243-245, 247-253]

- At 10:30 a.m., Lanthorn was transferred from the City Jail to the Washington County Jail, along with a copy of the City Jail's intake form which reflected he had been checked by the rescue squad for a seizure and that he was "okay". [App. 103-104, 131, 313, 373-374]

- At 10:45 a.m., Lanthorn arrived at the County Jail and was promptly placed in a holding cell on the second floor across from the front desk. [App. 460] A short time later, Lanthorn was interviewed by booking Jailer Wanda Robertson. [App. 471-472] Lanthorn related to her that he was not suicidal, that he loved life, and wanted to be where he could smoke cigarettes. [App. 472-473]

- At approximately 11:00 a.m., Jailer Billy Mitchell came on duty. Upon hearing other jailers discussing the various inmates who had arrived from the City Jail that morning, he recognized Lanthorn's name because he had transported Lanthorn to a psychiatric hospital about a month previously, and he informed his supervisor Sergeant R. D. Jamerson. [App. 377, 379] When informed of this fact, Sergeant Jamerson instructed Jailer Mitchell to check on Lanthorn and to determine whether Lanthorn needed to be on suicide watch or whether he could be placed in cell block B-4, the least crowded cell block. [App. 379-381]

- Jailer Mitchell went to the second floor to check on Lanthorn and found him engaged in another telephone conversation with his mother, Dr. Ellis. [App. 381] Eventually, Jailer Mitchell spoke with Lanthorn and addressed such topics as what had occurred to bring about his arrest, the likely disposition of his charges when he appeared in court and, ultimately, the issue of whether he was suicidal. [App. 382-383] Lanthorn responded, "Hell, no. I love life. I've got a baby on the way. You know, I've got to support my child." [App. 382] Following this conversation, which included Lanthorn's repeated requests to be placed where he could smoke cigarettes, Jailer Mitchell told Jailer John Cline that Lanthorn could be assigned to cell block B-4 and then assisted in Lanthorn's procurement of some cigarettes from these inmates. [App. 382-383] The cell block to which Lanthorn was assigned was not a suicide watch cell, but it did have a camera on one end that transmitted from the cell block to a monitor in a manned downstairs office.

[App. 453, 469] The monitors were not continuously watched, but rather had been installed as a security measure. [App. 450-451, 453]

- Lanthorn was placed in cell block B-4 at about 11:45 a.m. [App. 383] During a walk around between 12:15 or 12:30, Lanthorn was observed lying on a mat, and he asked for a television. Approximately one hour after that, he appeared to be asleep. [App. 383-384]

- At approximately 1:55 p.m., kicking and yelling were heard from cell block B-4, and two jailers immediately ran to the cell block where they observed Lanthorn hanging from the cell bars by a noose fashioned from a sheet. [App. 385] Lanthorn was unconscious, CPR was immediately instituted, rescue personnel were summoned, and Lanthorn was transferred to a medical center where he died the following day when life support systems were withdrawn. [App. 385, 470]

- Based on the telephone conversation Dr. Nancy Ellis had shortly before Lanthorn was placed in cell block B-4, Dr. Ellis expressed in a letter her written opinion that her son was *not* suicidal at the time she spoke with him. [App. 461-462, 474]

1. The Petition misrepresents the medical attention received by Craig Lanthorn in the City Jail.

Petitioners assert on page 3 that when Jailer Garland first discovered that Lanthorn was claiming to have had a seizure, "Lanthorn's pleas were ignored. APP. at 13a." However, if one looks at page 13a of the Petitioners' appendix, what one finds is that Jailer Garland summoned emergency medical personnel.

The Petition overlooks the undisputed facts that the medical personnel determined that Lanthorn was not having a seizure and that he did not need to go to the hospital. [App. 260-261, 270, 276] Petitioners also overlook the undisputed proof that EMT Green testified that, notwithstanding his professional opinion that Lanthorn did not need to be transported to the hospital, he offered to transport Lanthorn anyway and Lanthorn declined. [App. 281-282, 293-294] Furthermore, it is undisputed that Jailer Garland signed the refusal to transport line on the EMS form on behalf of Lanthorn at the instruction of EMT Green. [App. 282]

2. The Petition misrepresents that City jailers were inadequately trained on the topic of suicide prevention and further misrepresents that the City falsified its training records to obtain jail certification.

To advance a "failure to train" claim, the proper inquiry is whether the municipality's established program/curriculum is deficient and if a policymaker was aware of the deficiency such that it can be said the municipality was "deliberately indifferent" to critical training needs. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). In *Canton*, this Court anticipated the ease with which a failure to train argument could be advanced for any injury befalling those in the custody of law enforcement officers and expressly limited its use to protect the core concept that it is *abusive* government conduct the constitution seeks to prevent.

Petitioners assert on pages 6 and 16 of their brief that Johnson City "failed to make any reasonable effort to train their jailers" and "went to the trouble of falsifying its training records to create the appearance that such training had been

given." Petitioners' assertions are reckless, unsupported by the record, beyond the bounds of advocacy and overstatement to the point of misrepresentation. The following facts are undisputed:

- Johnson City has a written policy directed to the detection and proper handling of suicidal inmates. [App. 112-126] All City jailers were provided a copy of this policy and testified to their familiarity with it. [App. 199, 200]

- The Tennessee Corrections Institute, (T.C.I.), a state agency, conducts a basic jail school designed to train local government jail employees shortly after employment. [App. 198-200] The basic jail school curriculum includes the topic of custodial suicides. [App. 188-199, 694] Every Johnson City jailer attended this forty (40) hour T.C.I. conducted training program. [App. 134-146, 185-186, 198-200, 672, 674-675]

- Until 1992, T.C.I. sponsored a forty (40) hour annual training program to which local government jailers could be sent. Participation in the program served as one criteria for the facility in which they were employed to be certified by the State of Tennessee. [App. 898] All Johnson City jailers participated in this pre-1992 annual training program. [App. 890-896]

- Starting in 1992, T.C.I. reduced the number of annual instructional hours to sixteen (16) that it could provide to jail employees whose governmental entity employer desired to maintain a certified facility. [App.

201-205] In 1992, 1993 and 1994, T.C.I. provided training on the topic of suicide, medical and psychological identification, during the sixteen (16) hour T.C.I. sponsored training sessions. All Johnson City jailers participated in this training program. [App. 132-146, 150, 185-189, 198-200, 672, 674-675, 812–813]

- After 1992, to be designated by the State of Tennessee as a "certified jail", an additional twenty-four (24) hours of annual training for jail staff had to be coordinated or taught locally by a designated "field training officer" (F.T.O.) [App. 201-202] Johnson City designated Ken Hall as its F.T.O. to perform this function.

Petitioners' assertion that the City of Johnson City falsified its training records stems from bootstrapping the testimony of two (2) Johnson City jailers that, in their opinions, Field Training Officer Hall did a less than adequate job in 1992 and 1993 in providing the twenty-four (24) hours of local training. [App. 672-675] Even if F.T.O. Hall's training efforts were inadequate, exaggerated by him, or the training he did provide is disregarded entirely for the sake of argument, a claim against Johnson City on a failure to train theory fails for three (3) reasons:

(A) All Johnson City jailers received custodial suicide prevention training from T.C.I. sponsored courses;

(B) Hall is not a policymaker for the City of Johnson City, and his actions are not attributable to the City;

(C) Lanthorn did not die in Johnson City's jail, and the conduct of the City's jailers was not a proximate cause of his death.

3. The Petition improperly treats each individual Respondent as if he had knowledge of all factual allegations supporting Petitioners' claim.

For example, there is no evidence in the record that Jailer Garland had any knowledge of what occurred at the scene of the arrest. See Petitioners' Brief at page 2. In fact, the undisputed proof is that Jailer Garland was not at the Johnson City Jail at the time of Lanthorn's booking, and his first knowledge or contact with Lanthorn was at the time he first heard Lanthorn creating a disturbance in his cell.

The best example of this misrepresentation is contained in the Questions Presented for Review in the Petition. The first question reads as follows:

> Whether jailers are deliberately indifferent when they know of a detainee's disorientation, despondency, history of psychiatric care, recent involuntary commitment for suicide, and multiple requests for medical care, but refused to provide either medical care or protection from self-injury.

With respect to Jailer Garland, the Petitioners set forth no facts that he had knowledge that Lanthorn was despondent, had a history of psychiatric care, had a recent involuntary commitment for suicide or made any requests for medical care to any person after the EMS arrived. The undisputed testimony is that Lanthorn claimed (and acted like) he was having a seizure. Lanthorn asked to go to the hospital and Jailer Garland immediately had the EMS summoned. Petitioners similarly treat each individual Respondent and, thus, misrepresent the knowledge each had as to Lanthorn's condition and history.

4. The Petition misrepresents the evidence that Lanthorn was kicked or abused by Jailer Garland.

Jailer Garland's undisputed testimony is that, upon returning to Lanthorn's cell (while waiting for the emergency medical personnel to arrive), Lanthorn kicked Jailer Garland, and Jailer Garland placed his foot on Lanthorn's leg (between the foot and knee). [App. 668-669] Doctor Blake's testimony was that the autopsy revealed a bruise in the buttocks area consistent with a shoe print or stomp. However, Dr. Blake could not offer that opinion to a reasonable degree of medical certainty. [App. 496-497] Furthermore, as the District Court found, based upon the age of the bruise, it could have occurred while Lanthorn was in the Johnson City Jail, but it also could have occurred before he arrived. [Petition 70a-71a] Finally, the District Court held that an alleged statement by Lanthorn identifying Jailer Garland as his assailant was inadmissible hearsay, and this ruling was not contested in the Sixth Circuit. [Petition 71a-72a]

5. The Petition misrepresents how the decision to place Lanthorn in cell block B-4 was made.

Petitioners assert that Jailer Mitchell made a decision about Lanthorn's placement in B-4 "without reviewing the booking card or discussing Lanthorn's condition with [Jailer] Robertson." [Petition 5] Jailer Mitchell had been told by his supervisor, Sergeant Jamerson, to go and speak to Lanthorn and determine whether he needed to be placed on suicide watch or whether he could be placed in cell block B-4, the least crowded of the cell blocks that day. [App. 381] Mitchell spoke with Lanthorn and asked him if he was suicidal. Lanthorn responded, "Hell, no. I love life. I've got a baby on the way. You know, I've got to support my child."

[App. 382] Jailer Robertson, the jailer who had booked Lanthorn and was in charge of the third floor of the jail that day, was present during Jailer Mitchell's conversation with Lanthorn and when Jailer Mitchell subsequently told Jailer Cline, the officer in charge of the second floor of the jail where B-4 was located, that he thought Lanthorn could go in B-4. [App. 381-382, 393] Jailer Mitchell and Jailer Cline discussed what Sergeant Jamerson had said about placing Lanthorn in B-4 and agreed it was fine to put him in there. [App. 392] Jailer Mitchell believed he was putting Lanthorn where he wanted to be because Lanthorn had indicated he wanted to smoke and could smoke in B-4. [App. 382-383]

6. The Petition misrepresents that competent evidence exists suggesting that Sergeant Jamerson observed Lanthorn placing his head in a noose and did not react.

Presumably in an effort to garner this Court's attention, Petitioners also assert that Sergeant Jamerson saw Lanthorn putting his head in a noose on a video monitor, but failed to alert anyone until at least ten minutes later. [Petition 6] This statement is both irrelevant and unsupported in the record by any admissible evidence.

The statement is irrelevant because Petitioners' claim against Sergeant Jamerson based upon this allegation is not before this Court, but remains in the district court. The district court granted all of Defendants' motions for summary judgment with respect to Petitioners' section 1983 claims, with the exception of one claim against Jamerson. [Petition 42a] That claim is based solely upon Sergeant Jamerson's alleged delay in summoning help after allegedly observing Lanthorn in the process of committing suicide, allegations

that are in turn based solely upon certain statements former Sheriff Ron England made to the media concerning what Sergeant Jamerson saw. [Petition 65a] In essence, England's statements suggested that Sergeant Jamerson saw Lanthorn committing suicide, while Sergeant Jamerson always has maintained that he saw Lanthorn hanging motionless. [App. 432, 1033-34]

At the time Petitioners appealed the district court's dismissal of all the other section 1983 claims to the United States Court of Appeals for the Sixth Circuit, Sergeant Jamerson appealed the district court's denial of his motion for summary judgment. Jamerson's cross-appeal was based upon the ground that the statements of Sheriff England (who was not at the jail and had no personal knowledge concerning the incident) were inadmissible hearsay, and no other evidence suggests that Sergeant Jamerson either observed Lanthorn in the act of committing suicide or delayed summoning help once he saw Lanthorn hanging on the video monitor. As the record reflects, the Sixth Circuit affirmed the district court's dismissal of Petitioners' section 1983 claims based upon everything other than the allegation against Sergeant Jamerson, and dismissed Sergeant Jamerson's appeal on the ground that the Court of Appeals had no appellate jurisdiction over Sergeant Jamerson's appeal given the posture of the case. [Petition 10a] The Sixth Circuit also observed, however, that Petitioners' claim against Sergeant Jamerson was based upon "the rankest type of inadmissible hearsay" that was "unreliable and inadmissible in evidence." [Petition 10a] Thus, Petitioners' claim based upon the allegation that Sergeant Jamerson observed Lanthorn in the act of committing suicide and delayed reporting it remains in the district court, supported only by the inadmissible hearsay uttered by Sheriff England to the press, and is irrelevant to this Petition.

7. The Petition misrepresents that Washington County's jailers were untrained or inexperienced in suicide prevention and misrepresents that any action or inaction by Washington County jailers was causally connected to Lanthorn's death.

Washington County had a written policy for preliminarily screening those inmates who may have had a physical or mental condition that could be a threat to the health of the inmate or to the health of other inmates. [App. 477] After Lanthorn was transferred from the Johnson City Jail to the Washington County Jail in Jonesborough, Tennessee, he was seen by Sergeant Castle, Sergeant Jamerson, Jailer Cline, Jailer Robertson, and Jailer Mitchell. All of these individuals had successfully completed the forty (40) hours of basic jail school conducted by the Tennessee Corrections Institute, [App. 577-580] which included instruction on screening jail inmates who represented potential suicide risks. [App. 468] Indeed, Lanthorn was detained in a holding cell for observation and assessment before he was assigned to a cell with members of the jail population. [App. 380] While he was in the holding cell, Jailer Mitchell conducted an extensive assessment of Lanthorn which included personal observation and an exchange of oral communication, all of which convinced Jailer Mitchell that Lanthorn did not appear to be suicidal before he advised Jailer Cline that Lanthorn should be assigned to cell block B-4 with other members of the jail population. [App. 382-383] Lanthorn was then physically placed in cell block B-4 at about 11:45 a.m. [App. 383] Interestingly, at around 11:30 a.m. Lanthorn's mother, Dr. Nancy Ellis, a clinical psychologist whose clinical practice included providing therapy to individuals who had suicidal ideations and tendencies, [App. 461] had a telephone

conversation with her son at the Washington County Jail. Based on that conversation with her son, Dr. Ellis later expressed her opinion that Lanthorn was *not* suicidal [App. 474]

While Petitioners criticize the training policy of the City of Johnson City and Washington County, the record fails to point or direct us to any evidence that either Johnson City or Washington County had training programs that were deficient in any way. Neither do Petitioners direct us to any evidence of how a better training program on the part of Johnson City and Washington County could have prevented Craig Lanthorn's death. While it is true that proximate cause is generally a question for the jury, the burden remains with Petitioners, as in all civil cases, to establish by some evidence the issue of proximate causation. The Courts are not required to guess or infer the question of proximate cause. *Oklahoma v. Brown*, 117 S. Ct. 1382 (1997).

Throughout this extensive and voluminous record there is not one shred of evidence from which even an inference could be drawn that Johnson City or Washington County had policies, customs or long-standing practices in their training and supervision programs that were in any way causally linked to Craig Lanthorn's unfortunate death.

REASONS FOR DENYING THE WRIT

I. Standard for Deliberate Indifference in Jail Suicide Cases

Petitioners' main argument in support of their Petition for Certiorari is that the lower courts in this case, and the circuit courts of appeal in general, have misinterpreted *Farmer v. Brennan*, 511 U.S. 825 (1994).

In this Argument section, Respondents will set forth the *Farmer* standard and then explain why it is Petitioners who are misinterpreting *Farmer* as opposed to either the lower courts in this case or the circuit courts of appeal in general.

A. *Farmer Standard*

This Court in *Farmer* defined "deliberate indifference" as follows:

> For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. . . . and that the state of mind [of the state actor] is one of "deliberate indifference" to inmate health or safety. *Farmer*, 511 U.S. at 834.

In fact, this Court in *Farmer* equated deliberate indifference with "criminal recklessness":

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment . . . unless the

> official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer*, 511 U.S. at 837.

B. *Novel Standard Advanced by Petitioners*

Petitioners want to sue for the failure to prevent suicide without having to show any subjective knowledge of a substantial risk of suicide or self-harm. Petitioners argue that any other standard is too outcome specific. In other words, if a person has a medical need, there is a duty to provide the care regardless of whether the state actor recognizes a substantial risk of harm.

Petitioners clearly state their position on page 11 of their brief:

> If the red flags of risk are present and known to the jailer or are so obvious that a jailer's knowledge would properly be presumed, the duty to provide care is triggered whether or not the jailer is competent to differentially diagnose between a heart attack and indigestion or an aneurysm and a headache.

But this standard announced by Petitioners is simply not consistent with either *Estelle v. Gamble*, 429 U.S. 97 (1976) or *Farmer v. Brennan*, 511 U.S. 825 (1994).

For example, let's assume an inmate tells his jailer that his chest hurts. The jailer gives him two Alka-Seltzer for

indigestion and tells the inmate he will check with him in a couple of hours. In a couple of hours, the inmate is dead from a heart attack. While these facts might or might not support a state law negligence action (and in fact the Petitioners in this case have a state law negligence action presently pending against each of these respondents), the conduct of the jailer simply does not rise to the level of "deliberate indifference to a serious medical need."

Likewise, let's assume that an inmate is depressed. Just because the inmate might benefit from several counseling sessions with a mental health provider at some point in the future does not mean that he has a "serious medical need" or that there is a "substantial risk of serious harm." It is only when the jailer is criminally reckless with respect to the potential for self-harm that the conduct of the jailer can be said to be deliberately indifferent to a substantial risk of serious harm. *Estelle* uses the language of a "serious medical need" because it is a medical needs case. *Farmer* uses analogous language of "serious harm." No constitutional duty is violated for being deliberately indifferent to indigestion or deliberately indifferent to someone who is depressed and might need some counseling.

Therefore, what Petitioners are trying to do is sue for serious harm without having to establish subjective knowledge of a substantial risk of serious harm.

C. *Analysis Of Cases Cited By Petitioners*

On pages 11 and 12 of the Petition, the Petitioners cite various decisions in jail suicide cases for the proposition that courts have adopted a variety of widely inconsistent approaches to the problem of jail suicide — which has

resulted in a distortion of the principles set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).

But some of the cases are pre-*Farmer* decisions, *e.g.*, *Bowen v. City of Manchester*, 966 F.2d 13 (1st Cir. 1992); *Colburn v. Upper Darby Township*, 946 F.2d 1017 (3rd Cir. 1991), and therefore, cannot be distortions of the principles of *Farmer* (which provided guidance to the lower courts on the definition of deliberate indifference).

Furthermore, the other cases cited by Petitioners are all consistent with *Farmer's* requirement that in order to be liable for a constitutional violation a state actor must be deliberately indifferent to a substantial risk of serious harm.

In *Payne v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), the court required a showing that the defendant foresaw a substantial risk of suicide. The court even noted that "knowledge of the substantial risk of suicide can be inferred from the obviousness of the risk." *Payne*, supra, at 1042. This holding tracks *Farmer* which requires subjective knowledge of the substantial risk of serious harm — but which also allows that subjective knowledge to be established by showing that the risk was so obvious. *Farmer*, 511 U.S. at 842. Furthermore, this court denied the petition for certiorari in *Payne*. *See Payne ex rel. Hicks v. Chuchich*, 119 S. Ct. 2339 (1999).

In *Lambert v. City of Dumas*, 187 F.3d 931, 937 (8th Cir. 1999), the court reviews *Farmer* and holds: "[T]he deliberate standard is met only if there were a 'strong likelihood, rather than a mere possibility,' that self-infliction of harm would result." The "strong likelihood" test equates with *Farmer's* criminal recklessness/substantial risk of serious harm requirements.

In *Barrie v. Grand County*, 119 F.3d 862, 869 (10th Cir. 1997), the court held: ". . . the custodian must be 'deliberately indifferent' to a substantial risk of suicide." This test is consistent with *Farmer*.

In *Williams v. Lee Co., Ala.*, 78 F.3d 491, 493 (11th Cir. 1996), the court held: ". . . to establish deliberate indifference to a suicide risk in this circuit, the official must have notice of a 'strong likelihood, rather than a mere possibility,' of *the* particular decedent's suicidal tendencies." (emphasis in original) This test is also consistent with *Farmer*.

In *Flores v. County of Hardeman, Tex.*, 124 F.3d 736, 738 (5th Cir. 1997), the court cited with approval *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996). *Hare* was a jail suicide case in which the court of appeals remanded to the district court the question of whether the defendants had actual knowledge of the substantial risk of suicide and whether the defendants responded to that substantial risk with deliberate indifference. Once again, this standard is consistent with *Farmer*.

All of these post-*Farmer* cases follow the *Farmer* standard. Petitioners cite no court of appeals decision supportive of their proposition that one can recover for the decedent's suicide without establishing a subjective knowledge of a substantial risk of self-harm.

The only case Petitioners cite for their proposition is *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373 (E.D. Pa. 1998). The main issue addressed in *Owens* (but not resolved by the district court) is whether the standard of criminal recklessness or civil recklessness applies to the evaluation of the conduct of a state actor where the plaintiff is a pre-

trial detainee as opposed to a person who has been convicted of a crime. This is an issue not raised by the Petitioners in our case.

Although the *Owens* court does not resolve that issue, it does enunciate a criminal recklessness standard that is consistent with all of the court of appeals decisions cited by Petitioners. The *Owens* court held as follows at page 381:

> As the Court in *Farmer* pointed out: an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

D. *Analysis of Sixth Circuit Precedent*

The Petitioners' main criticism of the district court (and consequently, the Sixth Circuit) in this case is that the court applied a "strong likelihood or near certainty" test. But a review of the district court's decision reveals that the standard relied upon was consistent with *Farmer* and the circuit court of appeals' decisions previously addressed in this brief.

Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989), and its progeny, simply define what constitutes "deliberate indifference" in a jail suicide case — and it was defined as follows in *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992):

> [T]he proper inquiry is . . . : whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure

> to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs.

The biggest difference between Sixth Circuit precedent and *Farmer* is that *Farmer* makes it clear that the state of mind requirement must be proved using a subjective test. This arguably makes *Farmer* a more difficult standard for a plaintiff to hurdle, and this was recognized by the district court in its Memorandum of August 4, 1998 at page 6: "This clear recognition of a subjective component certainly did not ease the burden of proving deliberate indifference and arguably made the test more stringent." [Petition 24a, App. 43]

II. Response to Petitioners' Questions Presented for Review

Petitioners present three questions for the Court's review on page i of their Petition. However, those questions are never directly addressed in the Petition. As Respondents acknowledge that this Court can choose to accept any of Petitioners' questions for review, Respondents will address each question in turn with an explanation of why the question is inappropriate for this Court's review.

A. *Deliberate Indifference in Light of Jailer's Knowledge*

The first question presented by Petitioners is the following: "Whether jailers are deliberately indifferent when they know a detainee's disorientation, despondency, history of psychiatric care, recent involuntary commitment for suicide, and multiple requests for medical care, but refuse to provide either medical care or protection from self-injury." [Petition i]

Of the three questions presented for review, this is the only one that involves the application of *Farmer v. Brennan*, 511 U.S. 825 (1994). With respect to the law, and as discussed in the previous section, the standard relied upon by the lower courts in this case is entirely consistent with *Farmer*.

With respect to the facts, the individual jailers have a few comments. First, throughout this litigation, Petitioners have attempted to use all factual allegations against all jailers, regardless of whether a particular jailer had any knowledge of an alleged fact or not. For example, Jailer Garland had no knowledge of a history of psychiatric care or a recent involuntary commitment for suicide. Sergeant Jamerson and Jailer Mitchell had no knowledge of "requests for medical care."

Second, some of the "facts" are designed to mislead this Court. The allegation of "multiple requests for medical care" is an example of such a "fact." When Jailer Garland first saw Lanthorn, Lanthorn requested medical care several times in a matter of minutes. The EMS was summoned and arrived within a couple of minutes of Lanthorn's first request. After the EMS advised Jailer Garland that Lanthorn was okay to serve his time, there is no evidence that Lanthorn asked any person for medical care prior to his hanging twenty-two hours later. Of course, after the EMS left and before his hanging, he had interaction with jailers at the City Jail, a City Judge, an aunt and uncle, numerous other family members via telephone, a City transport officer and jailers at the County Jail.

Because the standard applied by the lower courts is consistent with *Farmer* and because there is not, as

Petitioners suggest, a "variety of widely inconsistent approaches," it is respectfully submitted that this Court should not grant certiorari on this question.

B. *Deliberate Indifference and the Failure to Train*

Petitioners also presented, but did not further discuss, the issue of "whether a city and county are deliberately indifferent when they fail to provide needed, readily-available training to address a known, pervasive risk of serious injury to the least culpable inmates — pretrial detainees with little or no criminal history." [Petition i]

Supreme Court Rule 14 states in pertinent part as follows:

> 1. A petition for writ for certiorari shall contain, in the order indicated:
>
> . . . .
>
> (h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.
>
> . . . .

While Petitioners mention the failure to train issue in the Argument section of their brief, they make no effort to explain why this Court should grant certiorari on a failure to train issue. Furthermore, the failure to train issue is governed by *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) — not *Farmer, supra*. Because Petitioners make no effort in their opening brief to comply with Rule 14, they should not

be permitted to make arguments in support of the grant of certiorari in their reply brief because this would put the governmental entity respondents at the disadvantage of being unable to respond to those arguments. *See Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995) (standing for the proposition that an issue listed in the statement of issues, but not addressed in the brief, is abandoned); *see also Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1441 (7th Cir. 1992) (standing for the proposition that an argument not raised in the appellant's opening brief is waived).

C. *Excessive Force by Jailer Garland*

The final question listed by Petitioners for review is the following: "Whether a 380 pound corrections officer may have used excessive force against a pretrial detainee who was lying on the floor of his cell when an autopsy revealed bruising on the buttocks consistent with a shoe print or stomp." [Petition i]

Petitioners' Petition barely mentions the excessive force claim in their Argument section and makes no effort to comply with Rule 14 by explaining why this Court should grant certiorari. Furthermore, the analysis of the excessive force claim does not even involve the application of *Farmer*. Therefore, because Petitioners have made no effort in their opening brief to explain why this Court should grant certiorari on an excessive force claim, the petition for certiorari should be denied on this issue. Moreover, Petitioners should not be allowed to prejudice respondent Jailer Sam Garland, in his individual capacity, by belatedly making an effort to comply with Rule 14 in a reply brief — which would put this respondent in the position of being unable to respond.

Finally, if the Court decides to grant certiorari on this question, Jailer Garland, in his individual capacity, asserts that Petitioners have waived the right to introduce any statements by Lanthorn allegedly identifying Jailer Garland as his assailant. In the district court, Petitioners sought to introduce a statement made by Lanthorn to his aunt and uncle who visited him in the Johnson City Jail purportedly identifying Jailer Garland as his assailant. The district court ruled that the testimony was not admissible hearsay under Fed. R. Evid. 804(b)(5) because the statement does not have equivalent guarantees of trustworthiness based upon the intoxicated condition of Lanthorn. [Petition 71a-72a]

On appeal, Petitioners made no effort to contest that ruling. Instead, they proffered testimony of Jailer Garland in which he said that in response to him [Sam Garland] complaining to Lanthorn about Lanthorn kicking him, that Lanthorn replied: "You kicked me." [App. 1289]

In Respondent Jailer Garland's Sixth Circuit brief, he pointed out that the hearsay problem associated with Lanthorn's statement had not been addressed and was waived. [Garland Brief at p. 20]

In Petitioners' reply brief, they argued that Jailer Garland's admission is nonhearsay. See Ellis Reply Brief at p.17. But at oral argument, counsel for Jailer Garland pointed out to the Sixth Circuit that Fed. R. Evid. 801(d)(2) was inapplicable because the statement was not Jailer Garland's statement and Jailer Garland never manifested an adoption or belief in the statement's truth.

CONCLUSION

There is a surprising disconnect between the Petitioners' "Questions Presented for Review" and their "Legal Argument" section. The Legal Argument section asserts that this Court should grant certiorari based upon the fact that lower courts have distorted the principles of *Farmer v. Brennan*, 511 U.S. 825 (1994) when addressing jail suicide cases. But of the three questions presented for review, only the first question involves the application of *Farmer*. With respect to questions two and three, the Petition contains no coherent argument as to why this Court should grant certiorari.

On the issue of *Farmer*, a review of the cases cited by Petitioners reveals that the lower courts have in fact applied a consistent standard in jail suicide cases — including, and most importantly, the lower courts in this case. Moreover, Petitioners cite no authority for their novel argument that they should be able to recover for a suicide without having to establish subjective knowledge of a substantial risk of serious harm.

On the one hand, Petitioners recognize the difficulty in foreseeing the risk of self-harm:

> As Justice Stevens explained in *Barefoot v. Estelle*, 463 U.S. 880, 920-21 (1983) (concurrence), addressing the use of expert testimony in the context of sentencing hearings, "mental health professionals. . . . when predicting violence, dangerousness and suicide. . . . are far more likely to be wrong than right." *Citing* Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527, 600 (1978). [Petition 14]

But while Petitioners acknowledge the difficulty of recognizing the likelihood of self-harm for someone who is a professional, they would have this Court adopt a standard for jailers that is closer to negligence than it is to deliberate indifference which this Court has defined as criminal recklessness.

It is respectfully submitted that this Court should deny the Petition for Certiorari because there has been no misapplication of the *Farmer* standard and because, with respect to two out of the three questions presented for review, Petitioners have made absolutely no effort to comply with Supreme Court Rule 14. Finally, these Petitioners should not be given an opportunity in a reply brief to advance arguments for the first time that were not presented in the opening brief.

Respectfully submitted,

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(3)

No. 99-1420

IN THE
SUPREME COURT OF THE UNITED STATES

NANCY LANTHORN ELLIS, et al.,
Petitioners,

v.

WASHINGTON COUNTY, et al.,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

REPLY BRIEF

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I. THE OBVIOUS DISPUTE AS TO MATERIAL FACTS SHOULD HAVE PRECLUDED SUMMARY JUDGMENT

Seventeen pages of defendants' Response were devoted to asserting that plaintiffs misrepresented the facts and evidence in this case. The vast majority of the cites for plaintiffs' facts/evidence, however, came from the District Court's Memorandum Opinion or the Sixth Circuit Opinions. The factual disputes merely validate plaintiffs' position below that summary judgment should have been precluded. Judge Daughtrey, in her dissenting/concurring opinion at the Sixth Circuit, recognized that error and vigorously opposed the action taken by her two colleagues.

II. FAILURE TO TRAIN FACTS

Defendants have accused plaintiffs of going "beyond the bounds of advocacy and overstatement to the point of misrepresentation" regarding defendants' failure to train. Response at p. 10. The record, however, demonstrates that accusation to be more projection than reality.

1. Allegedly, one week of training from TCI, which covers an enormity of subjects, is given to each Johnson City jailer. Defendant Garland's and head jailer Edmonson's basic training occurred in 1986 (App. 573-74)[1]. The record does not even establish whether suicide was covered at that time.

2. In the critical years of 1992 through 1996, Johnson City jailers did not receive the training that Johnson City represented for its certification. (App. 672-74, 644). For three consecutive years (surrounding Lanthorn's death), Johnson City blatantly misrepresented its training. Id.

3. Not only were training hours misrepresented, defendant Garland knew for years that his training was being misrepresented and did nothing to report those lapses. *Id.*

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[1] All references are to the Joint Appendix page number "[App. ___]."

His claimed eight hours of "suicide" training, his claimed eight hours of "suicide liability" training, and his claimed eight hours of "screening inmates" training, were all total misrepresentations by his own admission. Further, his "training" on medical needs was fabrication as well (App. 672-75).

4. The extent of defendant Garland's training was woefully inadequate (App. 672-75).

5. Moreover, Edmonson, the Johnson City Jail superintendent, was not properly trained (App. 649-50). He did not receive training in 1992, 1993, or 1994 that was represented. *Id.* He could not recall any training on suicide risk during the time period, or dealing with inmates with seizures (App. 649-50).

6. Defendant Hensley testified that although he was regularly dispatched to confront mentally disturbed people, he received **no** training in dealing with people with psychiatric or emotional problems, even though he attended all of the training made available to him (App. 742, 1001).

7. Lieutenant Beard, **Chief Administrator** of the Washington County Jail, had absolutely **no** corrections training until October of 1994 (two months after Lanthorn's death) (App. 576).

8. The only training defendant Mitchell received was one week of basic training that covered everything from jail safety procedures to tort law (App. 695-97) and his recollections of same were vague and inadequate (App. 695-97). Mitchell also failed to receive any additional training (even in 1994 and 1995, after Lanthorn's death) (App. 579).

9. Jamerson, who was **in charge** of the Washington County Jail, could not recall the specifics of any training related to suicide (App. 686-87), and could not recall any training regarding medical conditions of inmates (App. 687). This was despite at least four suicides during defendant England's term (App. 663) and seven citations by the Tennessee Corrections Institute in the five consecutive years

immediately prior to Lanthorn's death for failure to properly supervise at-risk prisoners (App. 1293-1366).

10. There was **no** in-service training for any Washington County Jail employee in 1993 or 1994 (App. 572-80). Even Lanthorn's death in August of 1994 did not change Washington County's customary indifference.

III. DEFENDANTS IGNORE THE MOST COMPELLING REASON FOR REVIEW

Defendants completely ignore the most compelling reason for review by this Court – the overwhelming evidence that the leading cause of death in jails and lockups is suicide involving our least culpable inmates – pretrial detainees incarcerated on minor charges with little or no criminal history. Defendants did not and cannot dispute that the ultimate deprivation (life) predictably and with alarming frequency has gone unchecked in our jails.

IV. DEFENDANTS FAILED TO SQUARELY ADDRESS EITHER OF THE TWO FUNDAMENTAL ERRORS IN THE WAY SUICIDE CASES ARE ANALYZED BELOW

To require that a jailer accurately predict a "strong likelihood" of suicide before liability may attach is overdemanding in light of this Court's decision in Farmer v. Brennan, 511 U.S 825 (1994). The Farmer analysis requires that a jailer subjectively draw the inference of **substantial risk** of **serious harm** (or it be so obvious that the jailer must have drawn the inference). "Substantial" is most analogous to the substantial evidence rule that requires administrative findings be upheld so long as there is material evidence (not a mere scintilla), even though the evidence may be **less than a preponderance**. *See* Balentine's Law Dictionary. "Risk" is merely the exposure to a **chance** of injury. *Id.* Thus, Farmer is fairly read to hold that an inference of material exposure to

a chance of serious injury triggers a duty to act reasonably to protect the inmate.

The courts below, however, generally require much more – a strong likelihood. "Strong" equates to powerful (see Blacks Law Dictionary) and "likelihood" requires a probability. *Id.* The Sixth Circuit's standard of "powerful probability" is clearly far more demanding than a preponderance standard or than Farmer's material exposure to a chance of serious injury." The standard applied to suicide cases in most of the circuits below simply cannot be fairly reconciled with this Court's standard for deliberate indifference in Farmer.

Moreover, defendants failed to address the unique requirement imposed in suicide cases below that the jailer must not only predict a strong likelihood of some serious injury, but must specifically meet an outcome specific test: that is, the jailer must **foresee the specific injury** – a requirement not imposed in any other medical needs case.

Worse yet, because the outcome in this case was a suicide, the courts below failed to even consider Lanthorn's claims for being denied his medication (which he undisputedly requested), denied his multiple requests to see his doctor, as well as the jailer's willful decision to ignore the medical technician's directive that Lanthorn's doctor be contacted, the excessive force used by Garland and the municipalities' failure to train. Compare this case with those not involving suicide, for example, with Hines v. Wilkinson, No. 94-3289, 1994 U.S. App. LEXIS 21598 (6th Cir., Aug. 10, 1994) (defendants delay in providing penicillin and pain medications prescribed by a dentist is actionable); Mawby v. Zent, No. 93-3583, 1993 U.S. App. LEXIS 31499 (6th Cir., Dec. 2, 1993) (refusal of Vitamin B6 and cutting course of treatment short is actionable); Shannon v. Lester, 519 F.2d 76 (6th Cir. 1975) (plaintiff may recover for any injury caused by delay in care and concomitant pain, suffering or mental

anguish); Rodriguez v. Jabe, No. 90-1010, 1990 US. App. LEXIS 9928 (6th Cir. 1990) (jailer's failure to provide hot-water bottle, Motrin and crutches is actionable.)

Defendants distort petitioners' position claiming that petitioners advocate a duty to provide care regardless of whether the actor recognizes a substantial risk of serious harm. Response at 20. That is plainly not correct. It is the overly demanding, outcome specific test that permits unconstitutional deliberate indifference to go unchallenged. No one can seriously dispute that suicide is serious harm. On these facts, the red flags (disorientation, bizarre behavior, etc.,) signaled the risk. Unquestionably, defendants Mitchell and Jamerson saw that risk (they claim they asked Lanthorn regarding same). The courts below, however, used the circumstantial evidence that defendants drew the inference of risk to exonerate defendants without inquiry into the reasonableness of the response to the known risk. That circular reasoning and the overdemanding, outcome specific standard, stripped Lanthorn of any meaningful Constitutional rights – even though he was only a pretrial detainee held on a misdemeanor.

As long as jailers are permitted to safely ignore the well known risk of jail shock and the well known indicators of increased risk of suicide, our least culpable detainees will continue to be our most frequent jail fatalities.

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